PROPOSED CHANGES TO SECURITY CLEARANCE PROGRAMS

HEARING

BEFORE THE

SUBCOMMITTEE ON CIVIL SERVICE

OF THE

COMMITTEE ON POST OFFICE AND CIVIL SERVICE HOUSE OF REPRESENTATIVES

ONE HUNDRED FIRST CONGRESS

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PROPOSED CHANGES TO SECURITY CLEARANCE PROGRAMS

THURSDAY, MARCH 9, 1989

House of Representatives,
Subcommittee on Civil Service,
Committee on Post Office and Civil Service,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:39 a.m., in room 304, Cannon House Office Building, Hon. Gerry Sikorski (chairman of the subcommittee) presiding.

Mr. Sikorski. The Subcommittee on Civil Service will come to order.

This subcommittee of the House Post Office and Civil Service Committee is charged with oversight of matters affecting civil service employees, and pursuant to this responsibility under Rule 1011 of the House, the subcommittee will examine the current security access program and proposed changes to that system.

For several weeks, Americans have watched transfixed as the Senate reviewed and assessed the qualifications of John Tower to head the Department of Defense. Throughout Mr. Tower's confirmation process, President Bush repeatedly stressed the principle of fairness and fair play and the opportunity for Mr. Tower to hear the allegations made against him and give him the opportunity to respond in his defense to those allegations.

This opportunity to confront our accusers, or at least the accusations, and to present our case when we are in danger of losing an interest of great importance to us, is one of the fundamental premises upon which America was founded.

The President is absolutely right to demand fair treatment for his friend, his political ally, his fellow Texan and former Senate colleague, as are the American people absolutely right to demand fair treatment for themselves as a rule of law. That's America.

Unfortunately, as the President is calling for fair treatment of Mr. Tower, an Executive order which would deny millions of Americans the same treatment is on the way through the President's Office of Management and Budget to the President's desk for his signature.

If President Bush signs this order, over 2 million Federal employees and 1.5 million Federal contract employees will be unfairly, at least potentially, affected. Free press in America would be restricted and American taxpayers will be further from ferreting out fraud, waste and abuse in Government.

How did we get to this point? The draft Executive order in controversy is reportedly the work of an interagency panel established to study and revise existing orders on regulations and guidelines affecting national security in the hopes of developing a uniform security access system and of stemming the unauthorized flow of sensitive information which could damage our national security interest.

The need for a uniform personnel security system is great. Currently, employees of Federal contractors are subject to Executive Order 10865, the Eisenhower order signed 29 years ago. This order affords basic procedural due process to an individual whose clearance is denied or revoked.

Under the Eisenhower order, before a final denial or revocation, an agency head must provide a written statement of the reasons for the action. The affected individual must then be afforded a reasonable opportunity to respond in writing and at a hearing with representation by counsel and cross-examination of adverse witnesses. Federal employees are subject to the security clearance procedures devised by their respective agencies and, for the most part, as we will hear, these agency procedures afford less, but at least some, due process rights.

The proposed order purports to provide uniformity but at the cost of stripping away appeal rights to American civil servants and Government contract employees. Furthermore, on closer examination, the proposal provides only the appearance of uniformity. The decisions are highly discretionary. They are based on vague criteria, and they will never see the light of review by an impartial tribunal applying a uniform set of standards.

Protection of our national secrets is of vital importance. A uniform security personnel system based on constitutionally grounded rules and understood by affected employees is also of vital importance.

The two are not exclusive. In fact, a constitutionally grounded security system would go a long way toward protecting the Nation's secrets, and the first few clauses of the Eisenhower order governing contractor employees embraces this very thought.

After declaring that the United States must protect against unauthorized disclosures, the order states that, "A fundamental principle of our government is to protect the interests of individuals against unreasonable or unwarranted encroachment." The struggle is in striking the appropriate balance between these two legitimate interests.

The imbalance struck by this new proposal headed for Mr. Bush's desk sacrifices rights Americans have fought too hard to now lose by the stroke of the President's pen. It is more than ironic that an action taken in the name of protecting our Nation and the values it stands for can at once forsake those same values.

Yet, the true irony of this proposal is more obvious. It is that a system which denies Americans the right to serve their country through a career in public service by withholding information that could result in the loss of a security clearance does not improve our national security.

In fact, the proposed system will inevitably lead to uninformed, inaccurate and unwise security clearance decisions grounded on undisclosed gossip, distortion, mistake, inuendos or worse and motivated—at least it could be—by malice, competition, envy, greed, prejudice, treason or the like. National security actually could be jeopardized at the same time that the integrity and reputations of millions of public servants are shafted.

Several additional concerns have been brought to the subcommittee's attention. After 5 years of percolating, the proposal seems not to have a basis or survivable rationale. While we all know of reports of unauthorized disclosures of secured information, as we will hear of later in testimony, and as we all have been informed by practitioners and hearing examiners who handle these cases daily, not one of the individuals cleared through the current security clearance hearing process has been the source of such disclosures nor have they turned against or betrayed our Nation.

Eliminating an aggrieved person's right to know the accusations and respond to them, therefore, does not solve our unauthorized disclosure problems. It does, however, violate due process.

Another issue raised by this proposal is its impact on congressional and public oversight of executive actions. Our Constitution rests unfettered oversight responsibilities of the Federal Government in the U.S. Congress. A provision of this proposal, however, imposes sanctions on any individual with a security access who fails to report inquiries regarding any subject involving classified information by a person who does not have such clearance. This includes congressional investigators or the press.

Similarly, as we will hear, this proposal would also allow agency heads to circumvent the Whistleblower Protection Act and other whistleblower protections afforded by similar statutes such as the False Claims Act and, in fact, the code of ethics. Ensuring the protection of our national secrets is imperative to preserving America and the values it stands for. This proposed executive order jeopardizes national security and compromises the very values we seek to protect.

Do you have any opening statement?

Ms. MORELLA. Yes; I do.

Mr. SIKORSKI. The Chair recognizes the gentlelady from Maryland.

Ms. MORELLA. Thank you, Mr. Chairman. I have to say this is my first meeting with you and I am very delighted to be on this subcommittee that you chair with such great leadership.

Mr. SIKORSKI. Thank you.

STATEMENT OF HON. CONSTANCE A. MORELLA, U.S. REPRESENTATIVE FROM MARYLAND

Ms. MORELLA. The issues that are going to be covered during this term of are vital importance to my constituency and indeed to the country. I represent about 44,000 Federal and postal employees in Montgomery County, MD. We have all been following the actions of the subcommittee and the Committee on Post Office and Civil Service very carefully.

The issue before us today, the proposed Executive order governing access to classified information, comes at a time when there is a sense of distrust and uncertainty among Federal employees because of the pay situation. Indeed, there is a feeling of lack of appreciation and loss of morale. I am sure we will hear testimony which will elaborate on this.

I understand the administration has not yet given final approval to the recommendation. However, I hope that those who are involved in writing and making changes in this proposal will have an open mind and take into consideration what the witnesses will offer today.

Certainly I appreciate that the administration is trying to standardize the system of security clearance and access to classified materials. However, the question to be posed is, has Executive Order 10450 failed to work during the last 30 years and, in the words of the unnamed sage—and not very articulate—"If it ain't broke, don't fix it."

There is no doubt in my mind that there must be principles governing access to classified materials. However, each agency deals with different degrees of classified materials.

In the proposal that we are considering, the standardization would indicate that those handling sensitive material at the Department of Education would be put to the same test as those in the Department of Defense. Would that mean that DOD personnel would no longer have to qualify for higher degrees of security clearance? And in the name of standardization and efficiency, are we going to deny Government employees an inalienable right, that of due process?

Does the administration really want to deny those who serve the Nation—either in Federal service or by way of private enterprise contracting with the Government—the basic rights which are to be afforded to all citizens?

Mr. Chairman, I commend you for promptly bringing this issue before the public and though the draft is not approved as yet, I believe that this hearing will be beneficial in working out a compromise which will be just, legal and in the interest of national security. I look forward to working with you, with my colleagues on this subcommittee and the administration in resolving this very sensitive issue.

Thank you, Mr. Chairman.

Mr. **Sikorski**. Thank you. That is our hope as well, to reach some kind of just conclusion. I personally want to thank you for your participation on the subcommittee. It is an honor to have you, and we look forward to a couple of years of a lot of work and good results.

Ms. **Morella**. Yes, good results. Thank you.

Mr. **Sikorski**. The gentleman from Indiana.

STATEMENT OF HON. FRANK McCLOSKEY, U.S. REPRESENTATIVE FROM INDIANA

Mr. **McCloskey**. Mr. Chairman, thank you. I too want to commend you for holding this hearing and for your leadership on these and other issues.

Due process of law, which includes the right to face your accusers, has been one of the fundamental tenets of the American legal order. No government should deprive anyone of life, liberty or professional security or advancement because of arbitrary or unjustifiable accusations by a single individual not subject to review.

This deprivation, in a nutshell, is a crippling defect of little noticed but potentially ominous Executive order governing the issuance of security clearances. Specifically, I am concerned about section 7.2 of this draft. This section would end the current practice of notification, rebuttal and appeal opportunities, which as Congresswoman Morella has indicated, appears to have worked well for many years since the Eisenhower administration.

In fact, these due process rights are expressly denied to candidates for initial access or for access at a higher level. This would prevent anyone who is denied an initial security clearance or a higher security clearance from receiving any indication as to the reason for such denial. Obviously, it would also preclude review and appeal rights and further legal protections.

It is my understanding, however, that review, appeal and fundamental due process rights and so forth, would still be available in the instances where security clearances are revoked. One of the things I want to hear from the administration on this is, why the double standard when the issues and the sanctions are substantially identical?

Mistakes occasionally occur within the Federal Government, no matter how diligent an employee may be. If a mistake is made in the processing of a security clearance, or false information is provided concerning the individual who has applied for a clearance, it would only be just, in my opinion, and in the best interests of the Nation, to allow this individual to redeem himself or herself. If no explanation whatsoever is given to the applicant and all appeal is denied, talented, qualified and loyal candidates will be given no opportunity for exoneration.

Clearly, the denial of a security clearance can have a disastrous effect on future career opportunities of applicants in both the private and public sectors. With decisions of this gravity, it is crucial that the proper decision be made. With denial of these basic due process procedures there can be no guarantee that an accurate and proper decision has been reached.

Executive Order 10865, issued by Mr. Eisenhower 29 years ago provides for such due process procedures. The applicant has the right to a hearing before a hearing examiner, aid of counsel, a right to confront witnesses and a right to review by the appeal board and the Federal courts.

There is no valid national security reason to change this long-established and respected rebuttal and appeal process except, as is currently done, when such information and procedure would compromise national security.

A recent New York Times column, discussing this draft proposal said, "Reliance on charges that have not been subject to testing by the person accused is a dangerous business." I agree.

As you know, Mr. Chairman, I and several other Members of the Congress, including yourself, have contacted the President to urge that he not approve this draft Executive order. I am concerned and even a bit perplexed that there has been no response to our letter of February 16. Even given time for problems in the administration and so forth, this is still a long time. Nor has there been public comment by the administration, despite strong reservations expressed by Members of Congress and the media.

I would like to thank our witnesses for appearing today and particularly as to our Government panel witnesses. I have read their opening statements and I am sure we are going to have a good exchange and a positive dialog. However, I will say in these statements there is essentially nothing as to the issue that we have convened these hearings for so when they do speak I would hope they get to the matter about which we are concerned. Thank you, Mr. Chairman.

Mr. SIKORSKI. I thank the gentleman from Indiana and would point out that he brings a unique insight to this problem, as a distinguished member of the Armed Services Committee of the House.

Mr. MCCLOSKEY. Thank you.

Mr. SIKORSKI. Thank you. If I am not incorrect—and that is a double negative—is Judge Bamford here? I do not see him. If not, we will go right away to Miss Mary Lawton, who is counsel for the Office of Intelligence Policy and Review at the U.S. Department of Justice. She served as chair of the interagency group that drafted the proposed Executive order and is here to tell us about the development of the proposal.

We have to underscore that it is a draft and it is working its way through the system. We appreciate her attendance here this morning and the committee looks forward to hearing her testimony.

Joining her will be Mr. Steven Garfinkel, who is the Director of the Information Security Oversight Office, or ISOO, of the General Services Administration, or GSA. He has presented testimony to us in the past and has always been of great help to this subcommittee and the full committee. Thank you both for coming. Why do you not come up, please?

Good morning, and thank you both once again for coming. We really appreciate your willingness to help the subcommittee out and focus some attention on these issues.

Ms. Lawton, you have presented us with a prepared statement. It will be placed in the record as you have submitted it. You can use your time to read it, summarize it or however you would like to proceed. Thank you.

STATEMENT OF MARY C. LAWTON, COUNSEL, OFFICE OF INTELLIGENCE POLICY AND REVIEW, UNITED STATES DEPARTMENT OF JUSTICE

Ms. LAWTON. Thank you, Mr. Chairman. It is a very short statement, but you have a long list of witnesses so I would sort of point out the essential facts; that the interagency group was first directed by the President in 1983 to review Federal personnel security programs and recommend revisions. The group did not agree on what its mission was and went back and sought further guidance.

The guidance we received was that we should be covering civilian, military and contractor personnel in a single system, which had not previously been the case; that we should not replace Executive Order 10450, but rather supplement it with an order directed exclusively to the question of access to classified information and that we should set basic standards for investigation and adjudication.

With that explanation of our mission, we went ahead and prepared a draft executive order, forwarded it to the National Security Council in November of 1987. And the group is no longer in being. Its task is completed. Since it was forwarded to the National Security Council further changes were made and it is now under circulation as a draft inside the executive branch. That is where we stand.

[The prepared statement of Ms. Lawton follows:]

TESTIMONY OF

MARY C. LAWTON
COUNSEL FOR INTELLIGENCE POLICY
U.S. DEPARTMENT OF JUSTICE

Mr. Chairman and Members of the Subcommittee:

I am pleased to respond to your request for background on the proposed Executive Order setting uniform standards for granting access to classified information. As you are aware, I chaired the interagency group that developed this proposal.

The initiative for a review of this aspect of personnel security came from President Reagan in the form of a National Security Decision Directive issued on March 11, 1983. The sixth and final provision of that Directive stated:

> The Attorney General, in consultation with the Director, Office of Personnel Management, is requested to establish an interdepartmental group to study the federal personnel security program and recommend appropriate revisions in existing Executive orders, regulations, and guidelines.

Working with the General Counsel of OPM, we pulled together an interagency group which ultimately included representatives from the Departments of Defense, Energy, Treasury and State, the Federal Bureau of Investigation and the Central Intelligence Agency as well as Justice and OPM. The Information Security Oversight Office occasionally attended as an observer but was not officially a member of the group.

At the initial meetings it became clear that the members of the group were not in agreement as to the scope of the President's mandate. Accordingly, we formulated an options paper for the National Security Council seeking clarification of our responsibility. It raised the following questions:

- Should we deal with access to classified information, all sensitive positions, or general suitability for employment?
- Should we undertake to propose a replacement for Executive Order 10450, a revision of that Order or a supplement to the Order?
- Should we set basic standards for background investigations?
- Should we set basic standards for adjudication?

By letter dated February 1, 1986, the National Security Adviser responded that we should deal only with access to classified information by federal civilian personnel, the military and contractor personnel. We should supplement, rather than replace, E.O. 10450 and should set basic standards for both investigation and adjudication.

With this guidance we then undertook to draft a proposed new Executive Order addressing the subject of access to classified information. Although there were many disagreements on specifics, as might be expected, there were several basic premises on which we all agreed.

First, we agreed that some government-wide system for granting access to classified information was long over due. As you are undoubtedly aware, E.O. 10450 by its terms does not deal with the question of access. Executive Order 12356 imposes a duty on each agency head to determine the "trustworthiness" of persons granted access, but provides no further guidance on this point. Current practice varies among agencies. We all agreed that centralized guidance was desirable.

Secondly, we agreed that there should be greater emphasis placed on the "need to know" principle in deciding who should have access to classified information. As a corollary, there should be greater accountability for the decision that a particular position, or a particular person, requires access.

Thirdly, it was the consensus that standards for granting access should be tightened and should be based on more extensive investigation. There was, however, some disagreement as to how high the standards should be in light of resource limitations affecting investigation and adjudication.

Finally, we all recognized that an effective program for access to classified information would require some centralized oversight mechanism to insure consistent implementation. There was, and still is, disagreement as to where oversight authority should lie.

Working from these premises, we drafted a proposed order which was forwarded to the National Security Council on November 20, 1987. That completed the work of the interagency group and it is no longer in being.

I understand that the National Security Council staff had additional discussions concerning the draft Order and made revisions in it. Thereafter, in accordance with Executive Order 11030, it was forwarded to the Office of Management and Budget. It is now being circulated for comment within the Executive Branch, as is customary with Orders of government-wide applicability.

This, Mr. Chairman, is the background of the draft Order that is now under review.

Mr. SIKORSKI. Thank you. Mr. Garfinkel, again we welcome you. Your statement is brief. You can read it or summarize it, do what you would like, even tap dance. [Laughter.]

STATEMENT OF STEVEN GARFINKEL, DIRECTOR, INFORMATION SECURITY OVERSIGHT OFFICE, GENERAL SERVICES ADMINISTRATION

Mr. GARFINKEL. Of those two choices, I think you would prefer that I read this statement and I will not even do that. If I could synopsize, the role of the Information Security Oversight Office has been a very minor one to date with respect to the proposed revision of the personnel security system.

ISOO serves as the oversight body for the information security system, the system under which information is classified, declassified and safeguarded. Several committees of the Senate and House of Representatives in reports that they have issued have recognized that a comparable oversight mechanism should exist with respect to the personnel security system, if and when it is uniformly administered. The interagency group that drafted this executive order happened to draft a provision that is still a matter of some debate within the administration that would assign this oversight responsibility to ISOO.

[The prepared statement of Mr. Garfinkel follows:]

STATEMENT OF STEVEN GARFINKEL
DIRECTOR, INFORMATION SECURITY OVERSIGHT OFFICE
BEFORE THE
SUBCOMMITTEE ON CIVIL SERVICE
COMMITTEE ON POST OFFICE AND CIVIL SERVICE
UNITED STATES HOUSE OF REPRESENTATIVES

MARCH 9, 1989

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

THANK YOU FOR THE OPPORTUNITY TO APPEAR BEFORE YOU TODAY TO DISCUSS WHAT HAS BEEN, TO DATE, THE VERY MINOR ROLE PLAYED BY THE INFORMATION SECURITY OVERSIGHT OFFICE, ALSO KNOWN AS "ISOO," IN THE FORMULATION OF THE DRAFT EXECUTIVE ORDER ON ELIGIBILITY FOR ACCESS TO CLASSIFIED INFORMATION.

UNDER EXECUTIVE ORDER 12356, ENTITLED "NATIONAL SECURITY INFORMATION," ISOO IS RESPONSIBLE TO THE PRESIDENT FOR OVERSEEING THE GOVERNMENT-WIDE SYSTEM UNDER WHICH NATIONAL SECURITY INFORMATION IS CLASSIFIED, DECLASSIFIED, AND SAFEGUARDED. THIS SYSTEM IS ALSO KNOWN AS THE "INFORMATION SECURITY" SYSTEM. TODAY'S HEARING CONCERNS WHAT WE FREQUENTLY REFER TO AS THE "PERSONNEL SECURITY" SYSTEM. THIS SYSTEM PERTAINS TO THE DETERMINATION OF TRUSTWORTHINESS OF AN INDIVIDUAL FOR PURPOSES OF DECIDING WHETHER HE OR SHE SHOULD BE ELIGIBLE FOR ACCESS TO CLASSIFIED INFORMATION.

CURRENTLY, ISOO DOES NOT HAVE JURISDICTION TO OVERSEE THE PERSONNEL SECURITY SYSTEM. ALSO, ISOO DID NOT SERVE AS A MEMBER OF THE INTERAGENCY PANEL THAT DRAFTED THE PROPOSED EXECUTIVE ORDER ON A REVISED PERSONNEL SECURITY SYSTEM THAT IS NOW UNDER CONSIDERATION.

UNDER THIS DRAFT, ISOO WOULD BE ESTABLISHED AS THE OVERSIGHT OFFICE FOR THE PERSONNEL SECURITY SYSTEM, PERFORMING FUNCTIONS THAT PARALLEL THOSE THAT ISOO CURRENTLY PERFORMS FOR THE INFORMATION SECURITY SYSTEM. HOWEVER, THE ESTABLISHMENT OF ISOO AS THE OVERSIGHT ENTITY, AS WELL AS A NUMBER OF OTHER IMPORTANT ISSUES PERTAINING TO THE PROPOSED PERSONNEL SECURITY SYSTEM, ARE STILL A MATTER OF DEBATE AND DISCUSSION WITHIN THE EXECUTIVE BRANCH. TAKING THIS INTO ACCOUNT WITH THE FACT THAT ISOO WAS NOT A MEMBER OF THE INTERAGENCY PANEL THAT PRODUCED THE CURRENT DRAFT MAKES IT BOTH PREMATURE AND INAPPROPRIATE FOR ME TO DISCUSS THE SUBSTANCE OF THE PROPOSAL ON BEHALF OF THE EXECUTIVE BRANCH. HOWEVER, IF IT WOULD ASSIST THE SUBCOMMITTEE'S INQUIRY, I WOULD BE MORE THAN HAPPY TO ANSWER ANY QUESTIONS THAT YOU MIGHT HAVE ABOUT ISOO'S FUNCTIONS, PROCEDURES AND INTERAGENCY RELATIONSHIPS IN OVERSEEING THE INFORMATION SECURITY PROGRAM, OR TO PROVIDE THE SUBCOMMITTEE WITH WRITTEN INFORMATION CONCERNING THAT ROLE.

Mr. Sikorski. Okay. The Chair recognizes himself for 5 minutes.

In your testimony, Ms. Lawton, you cited some of the rationale. The task force agreed that some governmentwide systems for granting access to classified information is long overdue, and I do not disagree with that.

Second, you agreed that there should be greater emphasis placed on the need-to-know principle and I do not have any objection to that.

Third, standards for granting access should be tightened and should be based on more extensive investigation and I agree with that. And finally, centralized oversight mechanisms to ensure consistent implementation was agreed to and I do not have any objections there.

You also state that the proposal only supplements rather than replaces the Executive Order 10450, which is another Eisenhower order establishing the general suitability requirements for government employment.

However, on page 21 of the draft proposal it states that, "Sections 2 through 9 of the Executive Order No. 10865 entitled, 'Safeguarding Classified Information Industry' are hereby revoked."

Now, this Executive Order 10865, is also an Eisenhower order. I think it was signed in 1960, and it provides employees of Government contractors with the basic procedure of due process rights I talked about in my opening statement: The right to have reasons for denial placed in writing, the right to respond to the denial and the right to be represented by counsel in that hearing process.

So it seems to me that the proposal does more than just supplement Executive Order 10865. Is that correct?

Ms. Lawton. That is correct.

Mr. Sikorski. Now, the Tower nomination process underscores the importance of an individual's due process rights. President Bush has said time and again that Mr. Tower deserves the opportunity to know the substance of allegations against him and the opportunity to present evidence to rebut those allegations.

He is correct in that Mr. Tower and every American deserves the opportunity to know why he or she is considered unsuitable for a position within this government, or is denied security clearance, or has that security clearance revoked, or is denied a greater clearance.

In 1983, after a number of reports of unauthorized leaks of information, President Reagan declared himself "Up to his keester" in leaks and responded by issuing the NSDD 84. That directive called for revisions in our national security system. We also know from previous Senate hearings that you raised the issue of due process protection in a memo to Robert McFarlane dated May 1, 1984.

In it you said, in issue 4, adjudicative standards under a new order, "Should uniform basic procedure and due process standards be included for all access, denials and revocations?" That is the question.

Your response is "The practical effect on the individual of a clearance denial or revocation can differ significantly, depending on the circumstances of that person's Federal employment. For example, in some cases, a denial or revocation can mean loss of employment or transfer to a less desirable position. Even where a denial does not have such drastic results, promotion potential could be affected.

"In these cases, the potential severity of a denial or revocation of access argues for a greater degree of procedural due process than might otherwise be established and with a few exceptions agencies must incorporate certain due process and appeal procedures into their adjudications for access to classified information in order to protect Federal employees and to survive judicial scrutiny."

I applaud your concern; and your conclusions, I believe, are well-founded. But in your opinion, would a system that allowed agency heads to deny an individual security access on the basis of allegations and conclusions which that individual has no knowledge about and no chance to rebut ensure fair and reasonable treatment of individuals?

Ms. LAWTON. You've packed so much into that, Mr. Chairman, that it is a little hard to know where to start.

Mr. SIKORSKI. Well, why do you not answer and then maybe I can go back and refine it.

Ms. LAWTON. Well, there is a difference and we think it should be a clearer line difference between an employment decision and an access decision. That is one of the purposes of this whole exercise, to draw that clean line which now is fuzzed up in the courts, somewhat. That is why 10450 remains in effect. Suitability for employment under 10450 and all the procedures 10450 provide would not be changed by this proposal. We are talking access here and the first decision on access is need-to-know and there are a great many people now who assert the right to clearance for resume enhancement purposes. They do not see a classified document from one year to the next, but they want it on their resume.

Mr. SIKORSKI. Or convenience, whatever.

Ms. LAWTON. Whatever. But that is not a basis for access. I would like to see that tightened up. Access may be denied just for that reason. Lack of a need to know. Now, that does not stigmatize an individual. It in no way affects their reputation. It is simply a decision that this person is not going to be seeing classified information and therefore does not need a clearance.

Mr. SIKORSKI. How would you know whether that is the reason if there is no written reason required?

Ms. LAWTON. Well, the decision——

Mr. SIKORSKI. I am with you so far. I just do not understand what is the up-front decisionmaking process. But what happens then in terms of the process rights of this individual, worsened for contract employees, certainly worsened for most Civil Service employees under the current agency-by-agency process? Under this order they are denied any right to hear of the reasons for the denial of their security clearance, even if it is not based on a need to know, it is as simple as that. We did not look at your background, we did not look at your employment history for 20 years, we did not look at any of that. We just do not think you have a need to know. But they do not get to know that, right?

Ms. LAWTON. There is no requirement that they be told. If an individual does not have the background investigation, does not fill out the forms and so forth, then it is a fairly clear indication that the decision is based on need-to-know right there. An individual knows whether or not he is investigated.

Mr. SIKORSKI. Let us say you do that to me. I am an employee of X agency and you do that to me and I do not have any written reason as to why it was denied and I go and apply over at ISOO and on the application, or during the process, I am asked, have you ever had a security clearance denial? What is my response?

Ms. LAWTON. No.

Mr. SIKORSKI. But I have been denied.

Ms. LAWTON. No; you have not been denied. The decision was made that you did not need one.

Mr. SIKORSKI. But I do not know that, because you have not given me anything in writing.

Ms. LAWTON. But you know it because you were not subjected to a clearance investigation. You know that, because you did not sign your Privacy Act waiver form. You did not fill out the form. You know that the whole process never got off the ground.

Mr. SIKORSKI. What if the process got off the ground and the decision is that I was denied for the reasons you have said? If I fill out the application for Mr. Garfinkel, I think the application asks if I have ever been denied. My truthful response is, have I ever applied?

Ms. LAWTON. Well, individuals do not apply for clearances. Employers apply for clearances for the individual.

Mr. SIKORSKI. OK. What do I respond to Mr. Garfinkel?

Ms. LAWTON. You have never been denied a clearance.

Mr. SIKORSKI. I have never been denied a clearance?

Ms. LAWTON. No.

Mr. SIKORSKI. And that there has never been an investigation. Now, what about the situation where I am in employment and need a classification to do my work?

Then I fill out the forms, give my employment history for my life, next door neighbor's, and that kind of stuff—my education, background, who knows me and that kind of thing—I then sign this universal consent to investigate me, and the process goes through.

Then what happens?

Ms. LAWTON. What happens will depend basically on the agency regulations.

Mr. SIKORSKI. I go to work for Mr. Garfinkel or I try to go to work for Mr. Garfinkel, what do I say on the application there?

Ms. LAWTON. If you are not under agency regulations advised that the clearance was denied——

Mr. SIKORSKI. Which is allowed now under this proposed order?

Ms. LAWTON. Certainly. Then you say you were investigated, but you did not receive one, and you do not know the reason. Give the truthful answer.

Mr. SIKORSKI. How would Mr. Tower do under that kind of circumstance? I mean, say, Mr. Tower wants a high-ranking job that requires a security clearance.

Ms. LAWTON. Well, as you know, political appointees have virtually no due process. It is purely discretionary. It is definitely an at will tenure.

Mr. **Sikorski**. Well, I am still stuck on the original idea. What is the rationale for saying that you do not have to give notice, a written reason for a denial or revocation?

Ms. **Lawton**. Well, the rationale I will give you from the Supreme Court is the protection of classified information must be committed to the broad discretion of the agency responsible, and this must include broad discretion to determine who may have access to it; that is, the Supreme Court in *Egan* v. *The Department of the Navy*.

Mr. **Sikorski**. Well, you keep moving back to before the decision is made. What is inconsistent with letting the person know why the decision was being made in writing? McCarthy did that.

Ms. **Lawton**. There is nothing inconsistent with it.

Mr. **Sikorski**. You, in fact, in your original 1984 memo, I think, to McFarlane said that due process rights which embrace the concept of being at least notified of the rational for denial or revocation were part and parcel of this exchange.

Ms. **Lawton**. Denial and revocation are two different things.

Mr. **Sikorski**. I understand that.

Ms. **Lawton**. Well, of course, that memo was written before the Supreme Court decided the Egan case.

Mr. **Sikorski**. Well, I understand that as well. But that is broad discretion to say no. I am not objecting to that. What is wrong with letting employees or contract employees know why as is done for contract employees——

Ms. **Lawton**. By and large there is nothing wrong with it. There are rare cases where it may be difficult.

Mr. **Sikorski**. But the draft says you can do that, but you do not have to. In fact, you can waive it, and there is no right of employees to have that.

Ms. **Lawton**. That is right.

Mr. **Sikorski**. They are consequently put in a very difficult position internally as you pointed out for promotion. There may even be loss of employment and certainly later on as they go through the application process if they are moving on to another job, especially within the Government and with security clearance procedures.

Ms. **Lawton**. Well, if loss of employment is involved, at least with Federal employees, you have got a different system. What we are talking here is a two-stage——

Mr. **Sikorski**. What kind of system?

Ms. **Lawton**. The statutory system of the Civil Service Reform Act for adverse actions.

Mr. **Sikorski**. And none of that takes precedence over the security clearance process?

Ms. **Lawton**. It is a separate process.

Mr. **Sikorski**. I understand. But it does not take precedence and it cannot. If you are a whistle blower or you are just a civil servant who did not blow a whistle and you do not have a procedure to deal with this issue we are talking about here, security clearances, that has precedental value that can override that——

Ms. **Lawton**. I do not understand you, Mr. Chairman.

Mr. **Sikorski**. I think you told us again go get relief someplace if you lose your job because of a security clearance through the civil service process.

Ms. **Lawton**. Yes.

Mr. **Sikorski**. That does not take precedence. You cannot get your job back. You cannot get your security clearance back through that process.

Ms. **Lawton**. You do not get the security clearance. That does not say you do not have a job.

Mr. **Sikorski**. You pointed out that it may, in fact, mean that you do not have a job.

Ms. **Lawton**. There are agencies where it does mean that. Those are agencies———

Mr. **Sikorski**. But they do not have—this individual does not have—you told us this individual could go get his job back but, no, he cannot.

Ms. **Lawton**. A job, possibly not the same job. But that can and has happened. I have been personally involved in cases where clearances were withdrawn, employees were placed in the agency, comparable pay, comparable job.

Mr. **Sikorski**. So, what is wrong with the current process of giving contract employees the right to know what happened, why it happened in writing?

Ms. **Lawton**. There is nothing wrong with it.

Mr. **Sikorski**. Why is it not continued in this draft?

Ms. **Lawton**. Because it is not mandated and we were to set the floor standard. That was our understanding, not the full agency standards. Agencies would be free to set more.

Mr. **Sikorski**. Well, you did not set anything that is uniform or a floor standard. You give the department heads a chance to wave everything off, and it gives them great discretion as to how much procedural rights they are going to extend to their people, if any at all, in this draft. "You" meaning the interagency task force.

Ms. **Lawton**. The draft distinguishes between initial grants and revocations.

Mr. **Sikorski**. I understand. And you give some—you have no rights for initial grants and no rights for moving up in terms of security clearances, right? No procedural due process rights?

Ms. **Lawton**. That is right.

Mr. **Sikorski**. And for the others, the revocation, you set out some and then say they can be waived. In both cases the employee has no due process right as a right or an entitlement to complain?

Ms. **Lawton**. That is right.

Mr. **Sikorski**. That is right. Why?

Ms. **Lawton**. Because as a matter of law the employee has no right.

Mr. **Sikorski**. As a matter of law the employee has no right?

Ms. **Lawton**. There is no liberty or property interest in the clearance.

Mr. **Sikorski**. You yourself pointed out there is promotion denial, possible, there is actual job loss possible, and—because no one can go to the Supreme Court and overturn this action—we are not going to give people the right to know why they were denied, even though they could lose their job and have to move to a different job, lose their chance for promotion, and have a blight and effect on their record.

Ms. Lawton. What we were trying to establish, Mr. Chairman, is a two-step procedure here.

Mr. Sikorski. Ms. Lawton, I understand all that. I just do not understand why we are hurting these people without extending what is currently in law now under the Executive order for contract employees and what is in operation for most of the agencies of the Government for civil servant employees. What is wrong with those minimal due process rights that are there now? Why did you obliterate them from the scene? What is the rationale for doing that?

Ms. Lawton. The rationale is to separate access decisions from adverse actions, not to remove any rights that exist as to adverse actions, but to draw a clean distinction between access decisions and employment decisions because the distinctions are now blurred in the courts and have led to very bizarre results.

Mr. Sikorski. How does denying someone the right to know why they were denied blur the access decision?

Ms. Lawton. That is not what blurs it. It is combining——

Mr. Sikorski. But that is what you are doing and that is the complaint here.

Ms. Lawton. No. We are trying——

Mr. Sikorski. I know what you are trying to do, but I do not understand the connection between that objective and the denial of due process, minimal due process rights of knowing why you got a denied application or denied a higher clearance. What is the connection? What is the logical connection?

Ms. Lawton. Perhaps a specific case will help.

Mr. Sikorski. I will bet it will, and I will listen to it. But why can you not tell me while you are doing that what is the connection?

Ms. Lawton. The connection is that we want to underscore for everyone involved that access decisions are separate from employment decisions.

Mr. Sikorski. And I heard that.

Ms. Lawton. That access is not a right. It is a privilege. If we make an error in granting access, we err on the side of denial. Again, the Supreme Court in Egan, if you make an error when you are talking access to classified information err on the side of the Government, not the individual.

Mr. Sikorski. Now, how does that connect to why they were denied access? How does that object, that meritorious goal reach over and then, once an access decision is made, and it is negative, reach over and deny someone the right to know just why they were turned down? How does that objective become enhanced by denying the individual what happened in the process?

I think it is indefensible and I think we have got to learn that fairness has something to do in this process, and you said it articulately in the original memo to McFarlane, and you have not been able to establish rationale for going back before Joe McCarthy and saying that people do not have even the minimal right to know why their application was turned down.

Ms. Lawton. I am not saying that people should not know if it is at all possible to tell them.

Mr. SIKORSKI. I know you are not personally, but the Executive order does do that.

Ms. LAWTON. But there is a difference between saying they should and saying they have a right.

Mr. SIKORSKI. You do not even say they should. You have revoked an executive order that says they should, and you are saying they do not have a right and they are not going to get it.

Ms. LAWTON. No, I am not saying they are not going to get it.

Mr. SIKORSKI. You have revoked the executive order that gives it to them.

Ms. LAWTON. Again, if I could go back, I mentioned this case.

Mr. SIKORSKI. Maybe someone else can do a better job. I will turn this over.

Ms. LAWTON. The case I was trying to describe to you is a situation that shows the confusion that now exists, and that caused us to draw this bright line.

The Air Force granted a contract for fire fighting services to a local corporation, and because the individuals had to come onto a very sensitive air base, they were given clearances.

There were some allegations of misconduct on the job. The base commander ordered them off the base physically, you know, I am pulling your passes. You cannot get on this base anymore.

Since they were no longer on the base, their clearances were withdrawn because they had no need for them anymore. It was not based on specific conduct. It was based on the fact that they could not get on the base and, therefore, did not need the clearance.

They filed suit citing the Executive Order 106865. The court specifically upheld the base commander's authority to bar them from that base and then ordered the clearances reinstated.

The court obviously did not see the connection between clearance and need to know. Now, they have clearances to do what? To not go on a base.

This is the sort of thing we base——

Mr. SIKORSKI. It sounds screwy to me, and I agree with you.

Ms. LAWTON. But this is the sort of thing we face in litigation, and this is why we want to draw clear lines that make it clear.

Mr. SIKORSKI. OK. But this individual or this company was told why they were not coming on the base?

Ms. LAWTON. I do not know if they were or not.

Mr. SIKORSKI. Well, you just told us they were not.

Ms. LAWTON. Well, the base commander's authority is pretty broad. I do not know whether he told them.

Mr. SIKORSKI. Now, what does that have to do with the revocation of Executive order provisions dealing with minimal due process for those that are denied a clearance?

Ms. LAWTON. The point of dealing with access and clearances separate and apart and wholly distinct from employment decisions is to draw for the courts, the public and everyone who has an interest the clear line that exists to emphasize clearance is a discretionary matter. Employment has some property interests, liberty interests involved. They are different animals. They need to be viewed differently.

Mr. SIKORSKI. I understand that, but I do not understand how denying someone the reasons gets you to that point.

Ms. LAWTON. But we are not denying someone.

Mr. SIKORSKI. If you are trying to say we are macho, we can do what the hell we want to do, you could cut off their little finger, too, to prove that. But what does that have to do with achieving that clear line?

What you are saying is we want to flex our muscles. We do not want anymore court cases on this issue of access denial. I am saying for purposes of argument, so you are besieged by these losses and the rest of it, so you lose half your appeals which you do.

What does denying someone the right to understand why they did not get this clearance have to do with the decision except that it makes it very difficult for them to do anything at that point?

If John Tower was told no way, no how, off the floor, out the door, good-bye, so long, farewell, what do you think the furor would be in this country? The Senate would just say we have under the Constitution the unlimited right to advise and consent, and we do not confirm. No one would explain their decision, not one of the 100 people would explain that decision. That is the way it is.

Ms. LAWTON. It is my understanding that the pink slip system of congressional senatorial courtesy works exactly that way.

Mr. SIKORSKI. Have you seen it work that way in the Tower situation? You have got people explaining their emotions before they come to a decision, let alone their decisions. It is out there. The President makes all kinds of speeches that this man has the right to know what the accusations are, who is accusing him, and respond, get the record straight issue by issue, and I think that is right. But you are not reaching that. You are just saying we want to flex our muscles. I do not think it is fair, and I do not think it is logical.

[Pause.]

Mr. SIKORSKI. Not bad for 5 minutes. You can have whatever time you would like to take.

Ms. MORELLA. Thank you. Let me just try to see if I can understand this.

Ms. Lawton, it seems to me there is criteria established for who has access to security, classified information, then there is separate criteria established for who has the right to know, even though they may have access.

In other words, I might be eligible for access to classified information, right?

Ms. LAWTON. Yes.

Ms. MORELLA. But then if I want to know about it, there is another set of standards that are being established or have been established or are being considered which is what our committee worked on in terms of am I eligible to know; I mean, do I have a right to know? Am I correct?

So, we are talking about two different things. In other words, I could have been cleared for having access, but I might not have the right to know by whatever criteria is established—whether it is somebody who is in charge of making that kind of decision that I do not have a right, or whatever the reasons may be, and that is what you are looking at. Am I correct?

So, the two are distinct entities?

Ms. **Lawton**. Yes. We are looking to emphasize that distinction because in practice currently I do not think that it is addressed as much as it should be. An office will decide I have eight people on my staff. We get two classified documents a year. I do not want to be bothered making sure it always goes to that person, so I will clear all eight of them when there is no need to.

One of the factors we looked at here, and it is important to understand is that there severe resource limitations in doing the background investigations necessary for these clearances. We thought as a group that it was extremely important to cut down the number of clearances, that there are too many out there are not really needed. And that if we reduce the number of people being cleared, we can do a better job in the clearance process with the investigation because we can concentrate our resources where they need to be concentrated. So, that was a major factor.

That is why we suggested that this decision on who needs to be cleared be made first and be made with a good hard look and not just a sort of cavalier, well, it is a sensitive building, everybody needs it.

Ms. **Morella**. If I could interrupt, do I have a right to know that I do not have a right to know? Do you see what I am saying.

Ms. **Lawton**. In legal right terms?

Ms. **Morella**. No.

Ms. **Lawton**. I do not suppose so, but I cannot imagine any reason not to tell someone. You know, we are not going to process you because you do not need a clearance. It usually works the other way.

Usually—for example, in my office where virtually everything we deal with is classified, it is a condition of employment in advance.

If I make an offer to someone to come to work for my office, it says conditioned upon a valid pre-employment security determination so that that person knows.

In other instances, people do not always know. We do background investigations of all assistant U.S. attorneys in the Department of Justice. We do that for employment purposes, not for access purposes.

Most of them, if something arises in a case, do not know whether they have a clearance or not. There is a roster kept. I know how to find out if a U.S. attorney is cleared, but most of them do not know this. They assume because they have backgrounds that they also have clearances, but that is not true. They have to pass a background for employment purposes regardless of clearance, and many of them do not have clearances.

Ms. **Morella**. Then if they want access to that file, their personal file, then you make another determination? I think it sounds pretty subjective. It sounds just like a judgment that the determination, just from what I have scanned from the materials I have before me, about whether they do have a right to know? Right?

Ms. **Lawton**. Well, under the draft Executive order you have one set of issues. There is a statute to the Privacy Act which gives an individual access to records held about them by which the Executive order does not and cannot alter.

Ms. MORELLA. How does that fit in? The Freedom of Information Act?

Ms. LAWTON. It is specifically the Federal Privacy Act.

Now, in the request under the Privacy Act, any individual would certainly be able to determine the adjudication that they were denied a clearance, that the clearance was limited to a certain level. They might not get every piece of information in the file.

If a piece of information was classified and properly exempted under the Privacy Act, they might not get that piece, but they get the personnel file so that they would know and have a right.

It is a statutory right. It is nothing that we do that can alter that.

Ms. MORELLA. I have a feeling some of us are going to be picking up on that particular point, so I will not belabor it anymore. But I would like to ask you a couple of other questions if I may.

How many times has the Government looked into the question of personnel security and have you ever testified on the Hill on that particular subject and before what committee to get some background?

Ms. LAWTON. I did not testify. The Senate held hearings several years ago and had some Defense Department and OPM witnesses, but I was not among them.

There have been, to the best of my knowledge, seven or eight study commissions since Executive Order 10450 was issued in 1953. Looking at the need to review that order and at the whole personnel security issue, they have all come a cropper. This is the furthest we have ever gotten to have a draft executive order.

They have all said that changes needed to be made, and that some more systematic problem—in the first place, 10450 only applies to civilian employees. There is no order governing military employees, no Executive order. Contractors are governed by a different Executive order. It's rather a hodgepodge right now.

Ms. MORELLA. Does the Civil Service Reform Act give procedures or establish procedures that apply in the area of personnel security?

Ms. LAWTON. The Civil Service Reform Act has procedures that apply to promotion, dismissal and similar actions which would include for reasons of security as well as for other reasons. It does not deal with and the Supreme Court has said that access decisions are not subject to those statutes. But dismissal of an employee, demotion, those are adverse actions, and they are governed by the law and the procedures are set out in statutes and again, no order to change that.

Mr. SIKORSKI. If you would yield to me on that.

Ms. MORELLA. Yes.

Mr. SIKORSKI. You yourself said in your own memo that denial in some cases is tantamount to dismissal or loss of employment. Certainly it affects promotion?

Ms. LAWTON. It has an effect. It should not be tantamount to the sense of it being simultaneous. This should be a two-step decision.

Mr. SIKORSKI. Well, if I lose my job, my wife would feel real good because I said it did not happen right at the same time, and it came a little bit different later. [Laughter.]

But there is no protection in civil service laws for people that have whistle blown and then get their security clearances pulled. And with what you are proposing—there is very little protection now even though we are doing the whistle blowing, everyone feels very good about this compromise we have worked out with the Department of Justice. The administration and everyone feels real good about the new law. All that you can throw out the window if this Executive order is signed.

Ms. LAWTON. I notice that you made a considerable point of that in your opening statement, Mr. Chairman.

Mr. SIKORSKI. I hope it gets better the next time. [Laughter.]

Ms. LAWTON. Frankly, I am at a total loss to see any connection between access to classified information and whistle blowers. [Laughter.]

Mr. SIKORSKI. Let me just ask you to stay here for the next panel because those people are in the total business of dealing with whistle blowers, and they will give you case after case after case where the security clearances were a means of punishment. They were a means of getting to whistle blowers. They were a means of intimidating whistle blowers.

It is in their testimony as well. Let me just make mention of this.

You asked about studies. The DOD Industrial Security Review Committee, the DOD Security Review Commission, the Senate Governmental Affairs Committee, Permanent Subcommittee Investigation, Senate Select Committee on Intelligence, House Permanent Select Committee on Intelligence all did studies on these issues when the task force was going on.

All of them said we could do better, but not one of them said that there was a reason to justify the due process protections that currently exist, that the due process protections were not a problem for the security objective. And thank you for yielding.

Ms. MORELLA. Thank you, Mr. Chairman. I have just one final question. I have some others, but I want to hear the testimony of others, too.

Do you think that the Government should be obliged to give reasons for refusing to grant access?

Ms. LAWTON. Well, I would have to be careful about your words, refusing to grant access.

Ms. MORELLA. Yes, I know.

Ms. LAWTON. Refusing because it is not needed, no. I do not think the Government gives any reasons at all for that. That is a government decision. You do not need access.

Ms. MORELLA. But it is kind of judgmental, is it not?

Ms. LAWTON. No.

Ms. MORELLA. I mean, we decide who gets the access.

Ms. LAWTON. No, it has to do with what the function of your job is. It is a decision on job function. Your job does not require access. Therefore, you do not need access.

Mr. SIKORSKI. But—if you will yield—under your proposal the Government does not have to say that. You in your own mind are convinced that if it is not needed, that is justification alone.

But your Executive order says you do not even have to say that. You do not even have it is not needed for your job. No further discussion. Your Executive order is saying you are not getting it, end of discussion.

Ms. LAWTON. Mr. Chairman, people do not apply for clearances in the Federal Government. The employer applies for the clearance. And if the employer is told by a security officer——

Mr. SIKORSKI. A clearance for whom? A clearance for what?

Ms. LAWTON. A clearance for an employee.

Mr. SIKORSKI. OK. When that is denied, you say if it is not needed, that is sufficient alone.

We are saying you do not say that. You are allowing this decision to be made without giving any reason.

Ms. LAWTON. When the office manager goes to the security office with a memo and says I want Jane, John, and Michael cleared, and the security officer comes back—and he will come back and say Jane, John, and Michael, you have not provided the justification for clearing Jane, John, and Michael. The reply goes to the applicant. The applicant is the office manager. The applicant is not Jane, John, and Michael.

Mr. SIKORSKI. Jane, John, and Michael have been denied security clearances.

Ms. LAWTON. No, they have not.

Mr. SIKORSKI. Security clearances for Jane, John, and Michael have been denied. Yes, they have. Security clearances for Jane, John, and Michael have been denied, right?

Ms. LAWTON. No. The security office has determined that they do not need them.

Mr. SIKORSKI. Who?

Ms. LAWTON. Jane, John, and Michael.

Mr. SIKORSKI. Who is on second? [Laughter.]

Ms. LAWTON. Because the justification of the manager is not sufficient to explain why it is needed.

Mr. SIKORSKI. It is the gentlewoman from Maryland's time.

Ms. MORELLA. So, in other words you are saying they just did not need a clearance and that is why it is denied, and I can understand that.

Ms. LAWTON. Yes.

Ms. MORELLA. I will yield to Mr. Ridge in just a moment, but incidentally I do want you all to meet the newest member of the Post Office Civil Service Committee and who selected the Subcommittee on Civil Service, the gentleman from Pennsylvania, Tom Ridge.

Mr. SIKORSKI. We are honored to have him and look forward to working with him.

Mr. RIDGE. I am pleased to be here.

Ms. MORELLA. I just want to ask, when does the security clearance begin? If you are going to do it, do I wait until I get out of law school or do you go back and check whether I had a credit card when I was 18 at Sears and did not pay my bill?

Do we know when we start?

I know it is a little bit on different subject, but it is pertinent.

Ms. LAWTON. It varies with the level of clearance being sought.

Generally speaking for a top secret clearance, they will go back 15 years or look at adult life when you are talking about a younger person. But 15 years is a basic standard on top secret.

On secret clearances agencies vary without how much investigation they do.

Ms. **Morella**. What if I have a credit card that I abused in terms of my credit? Would that prevent me from a security clearance for some jobs, even though it was in my youth, which was a long time ago?

Ms. **Lawton**. How long ago will make a big difference. If it looks like a current financial problem, yes, because we have noticed with the espionage cases we have had of late the biggest motivation is financial, and so we are now looking much more closely at financial difficulties, but current difficulties.

The security office takes youth into account or the adjudicators take youth, length of time, current record versus past record. All of those things are taken into account when making a decision, and they are supposed to be individualized decisions.

One of the problems here is that security officers have been looking and looking for the sort of magic talisman, give me 15 points for this and two demerits for that, so they can get a nice mathematical decision, and we are trying to say on this order and elsewhere you cannot do that. You make individualized judgments.

If you find a pattern of trouble with the credit card, then straightened out, then trouble again, then straightened out, then troubled again, that you would worry about. If you found somebody that did something foolish as a kid, no.

Ms. **Morella**. If I had a security clearance and then I had an account that went awry, could the security clearance be taken from me or something like that?

Ms. **Lawton**. Depending on how bad it was, yes. If you were in really deep financial trouble, the clearance could be taken or it could be downgraded.

But we had in the case of Thomas Cavanaugh, he tried to sell—he had financial problems and was trying to get his security clearance updated to top secret so that he could get a promotion.

So, he tried to sell the Stealth bomber to the Soviets for $25,000 so he could clear the debts to get his clearance because he knew that was going to be a problem. He has got worse problems now, I might add. [Laughter.]

Ms. **Morella**. Did you want me to yield to you, Mr. Ridge.

Mr. **Ridge**. No, thank you. I will wait my turn.

Ms. **Morella**. I am just about finished, but did you want to say something, Mr. Garfinkel? I feel badly that we did not ask you any questions.

Mr. **Garfinkel**. No, thank you. That is perfectly all right.

Mr. **Ridge**. He is happy you have not asked anything.

Mr. **Sikorski**. Mr. McCloskey.

Thank you. Thank you for your patience. The gentleman from Indiana.

Mr. **McCloskey**. Thank you, Mr. Chairman. Thank you all so much for being here to talk about this.

I want to say that although this is a committee process and still under review, and there are a lot of cooks, but I would like to ask who was the master chef for what is driving this right now?

Do you really think the Executive order is going to be approved in the end with no alterations for our concerns today, which I think are very basic concerns?

Ms. LAWTON. The process now is being directed by the Office of Management and Budget. I am not even doing the comments for the Justice Department. My job is done.

There will be a lot of give and take, I think, in this process.

I have no idea if an order will be issued, if so, when it might be, or what it will look like. I think there will be a lot of give and take back and forth.

Mr. MCCLOSKEY. Has the Executive order passed constitutional muster? I mean, did the drafting group have a constitutionality review or decision process?

Ms. LAWTON. The group did not because the group were not all lawyers. The group were a mixture of security personnel and so forth.

But our own civil division has looked at it, my office has researched it, and I believe the Office of Legal Counsel has also researched it on the constitutionality and are satisfied.

Mr. MCCLOSKEY. They do not see any constitutional problems?

Ms. LAWTON. No; particularly after the *Egan* case, no.

Mr. MCCLOSKEY. I would just say—and I think it has been expressed very well by Mr. Sikorski—that I know you are doing the best you can with a committee process that is probably not all your doing.

But your repeated statements, that denial of a security clearance does not endanger employment nor property is very problematic.

As we all know, and you have admitted it, access ultimately can be an employment or a property concern. So, it is a two-step process.

As the chairman said, the result is the same. You are without employment or advancement opportunity.

I do commend you for your concerns to rationalize the process of issuing clearances and to issue fewer clearances and so forth.

I do not think the issue here today concerns the "need to know." "Need to know" is one area which I think can be very functionally and directly handled.

But I do think you understand that this is going to be a subject of continuing legislative review if there is not a basic protection in that final draft for due process.

Do you have any comment on that? I mean, if you are without your job or without your advancement, that is a disastrous problem.

Ms. LAWTON. Yes. I am sure that what is being said here and some of the discussions that have taken place with the intelligence committees will be taken into account. There is a difference, it seems to me, in what we mandate and what we recommend.

One of the reasons for having an oversight body in the concept here is to get a little more uniformity and what may be recommended is not necessarily what appears in the base line law, either. So, I do not know how it will come out. I just hope that there will be some movement here. So many, many of these studies have gotten hung up and gone nowhere, and we have a diverse and inconsistent and misunderstood system.

Mr. McCloskey. What has been the real problem, though, as far as people having due process rights?

I admit it is inconvenient. Due process does not convenience government, but it has been a fundamental of the entire history of our civilization. It what distinguishes us from the Soviets.

Ms. Lawton. Well, there are different sorts currently of procedures in the contractor area. There is a rather elaborate structure that is a lengthy one with the federal employee in many cases, it is written notice, opportunity to respond in writing goes up one level. That is it. You do not have trials as trials with cross-examination and formal rules of evidence and this sort of thing. The contractor system is more elaborate.

You have, perhaps, some perception of unfairness in terms of a person who works for Uncle Sam has less procedural rights right now than the contractor. You also have delay. There is in the federal system by statute by act of Congress, not by any presidential order, a fast track system for suspending somebody on security grounds to get their hands off the classified stuff now while you proceed with the adjudication.

I do not believe there is any comparable thing for contractors, and that could in a given circumstance be a problem.

Mr. McCloskey. Most of us here today are employees of the Federal Government. Do you not feel better and have more confidence in a governmental employer who gives you the right to review and appeal rather than someone who may do it on a discretionary basis?

Ms. Lawton. Sure.

Mr. McCloskey. You do see the difference between a right and subject to governmental discretion. That is so basic.

Ms. Lawton. Well, I know I do not have a right in the access field. I would hope I would be given the opportunity. That is the distinction I am trying to make. It is not a right when you are talking access.

Mr. McCloskey. But we are not talking about a right to access. We are talking about a right to know why you do not get the clearance. No one is talking about a right to access. No one is saying everybody should have a security clearance. We should cut the number of security clearances down. You should be commended on that proposal.

Ms. Lawton. But, again, I draw the distinction between the right—I do not think there is a right to be given a reason. I think the Supreme Court has made that clear.

Mr. Sikorski. Would the gentleman yield?

Mr. McCloskey. I will yield.

Ms. Lawton. But I think good employee policy may very well say that if you want a happy work force—if you want a work force that respects their managers, that you do this as a matter of policy.

Mr. Sikorski. On your questionnaire for sensitive positions, standard form 86, are you familiar with that?

Ms. Lawton. Oh, yes.

Mr. Sikorski. Question 27, to your knowledge, "Have you ever had a clearance or access authorization denied, suspended or revoked?" What would the answer be?

Ms. LAWTON. Whose answer? My answer? No, it never happened to me.

Mr. SIKORSKI. What about Tom, Jane, and Mike, or whatever the names were in your previous example.

Ms. LAWTON. No, it has not been.

Mr. SIKORSKI. Would you provide the subcommittee with a writing in the fact situation that you outlined of John, Mary, and Frank or whoever their supervisor requested a clearance for them and was denied by the security officer how they would answer question 27. OK.

Ms. LAWTON. OK.

Mr. SIKORSKI. We just want to understand it.

Ms. LAWTON. As I understand it, one of the things we were trying to do here in separating these decisions and making the distinctions clear is to get and convince the entire federal government to adopt a consistent terminology for this sort of thing.

You talk about a clearance being revoked. That means we had it and somebody took it away. When you talk about a clearance denial versus a clearance not authorized, there is a difference and we need a better vocabulary here so that we do not stigmatize people.

I could withdraw a clearance from an attorney in the civil division because the case is over that they needed access for, so it is withdrawn for lack of need. That is not denial, that is not revocation. That is a withdrawal. We have to be very careful about those.

Mr. SIKORSKI. But I think that is very good. I did not see anything in the proposed Executive order that does just that. But if you can do that.

Ms. LAWTON. That is what Steve is going to take care of.

Mr. SIKORSKI. But if you can do that as an addition, it would be nice. But it is not just justification for this draft order that the President is going to have to look at.

The gentleman from Pennsylvania.

Mr. RIDGE. Thank you. My grandfather used to tell me that the older he got, the more liberties he could take with what he remembered, what he saw and what he heard. He could be very discriminating in that way.

I guess as a newer member of this committee, I have a lot to learn, to see and to hear, and for that reason I want to start at the very beginning of this whole dispute and try to clarify in my own mind a couple of these things.

I want to give you a hypothetical. I employ some very talented young people on my staff. And although I am not on the Armed Services Committee, I have a particular interest in a lot of things that they do which, from time to time, requires that one or more of my staff may need access or need a clearance. So, I make the decision that Attorney Ann Williams needs access. I have made that decision. And, let us say hypothetically I put my request in and somebody in the executive branch says that is nice that you have made the request, but she has no need to know. All right. She does not have to have access whether you have requested it or not. She has no need to know. How does she answer that question on the form?

Ms. LAWTON. It is certainly not a denial of a clearance on the merits.

Mr. SIKORSKI. I do not think it said on the merits.

Mr. RIDGE. Here is the point I am trying to make. You are on the horns of a dilemma, and I think this Executive order puts you there and is something that I think all of my colleagues are sensitive to. I think one of the problems I have with it is how that is construed, and how it may be construed internally by people looking for promotions.

If that is construed as a lack of qualifications on her part to be denied access, that is totally unfair to her, totally unfair, that somebody else independently made a judgment that she should not have access. It does not have anything to do with her background. It is not a historical check. It is just that somebody else says she does not have a need to know.

So, when she goes to answer that question on her form, it is kind of bewildering to her. That is what concerns me about this, because it seems to me there are two things. There is, one, somebody has to make a decision as to whether or not you have a need to know, and I do not think there is any right to anybody in the Federal Government to have access just because they want it. I mean, I do not think that is the point.

But if somebody makes the request on your behalf and you are denied that and then not told, not that you were not qualified to have it, but that somebody independently decided that your particular job was not of such a nature that you should be given access. That does not have anything to do with you. But in the job description you are not going to have the access. That puts the Federal employee in a pretty awkward position, does it not, particularly when it comes to just something as fundamental as answering that question.

Ms. LAWTON. Well, yes, it would. And currently we do not have that sort of system, certainly not as between the executive and the legislative branches.

Mr. RIDGE. I understand.

Ms. LAWTON. There is no system in the House. The Senate now has a security manual, but the executive branch would not, I think, attempt to take the judgment away from you.

Mr. RIDGE. That was a rough hypothetical. I understand that.

Ms. LAWTON. Currently there is no system for formally separating these two decisions. We are trying to mandate one. Presumably that would also mandate changes in that form. That is, after all, an executive branch form and exchangeable. Once we have a decision, for separate decisions are made on need and eligibility and continuation, then we can work out the uniform vocabulary that will straighten out that question. And it needs to be done because presently how would you answer the question. The new order has nothing to do with it. Those decisions are being made without any formal system now as between need and eligibility and there is a difference.

Mr. RIDGE. Well, then, let us move on to the eligibility. It has been determined that I have a need to know, but there is the fact that I am not eligible for it. If institutionally we are not going to protect that employee from either misinformation or a subjective bias, where is that employee going to get the protection if they do not have access.

I mean, if you do not provide institutionally an opportunity to be heard on that, where are we going to provide the employee protection? Who should protect him, and how can they be protected?

Ms. LAWTON. Well, they are protected by law from adverse action consequences that may flow from that decision because those are the procedures used in the Civil Service Reform Act, and they are not changed. They are protected by the Privacy Act in terms of having an access to records of correction of records. That is all in law. It is not changed by this order.

They may well be protected by agency regulations in addition.

Mr. RIDGE. What public interest—I mean, there is a balancing of the public interest—what public interest is preserved or promoted by not explaining the reasons for the denial on the spot rather than going through these other procedures and giving the opportunity to be heard? What public interest—when you are balancing the merits—what public interest is promoted by not giving that employee specific reasons for the denial and the right to be heard or to challenge that due process for him?

Ms. LAWTON. Ninety-nine times out of 100, none.

Mr. SIKORSKI. Will the gentleman yield?

Mr. RIDGE. Please.

Mr. SIKORSKI. What is the public interest in the 1 out of 100?

Ms. LAWTON. The sensitivity of the source of the information.

Mr. SIKORSKI. National security?

Ms. LAWTON. Yes.

Mr. SIKORSKI. But that is there now.

Ms. LAWTON. Yes, that is there now. We are not changing that.

Mr. RIDGE. Thank you. Thank you, Mr. Chairman.

Mr. SIKORSKI. I thank the gentleman.

Mr. Garfinkel, you stated in your testimony that your office was not involved in drafting the proposal, yet have signed the order, would not trust your office with the oversight of the entire personnel security system.

Next we will hear from a panel including Mr. Allan Adler of the American Civil Liberties Union, which has serious questions about the ability of your office or any other agency to handle the combined responsibility of information classification that you do now and oversight of the personnel system. What is your opinion?

Mr. GARFINKEL. Well, sir, certainly we could not do both jobs with our current resources.

Mr. SIKORSKI. How many more would you need?

Mr. GARFINKEL. Our current staff is only 12 persons, including clerical personnel. So, I would estimate a staff of approximately 35, perhaps 40 people.

Now, there are people currently within the executive branch of government who do similar work, not exactly the same work, but who do some of the work right now, and I would imagine if the order were effectuated, some of these people would move over to ISOO.

Mr. SIKORSKI. The design for this oversight, you heard Ms. Lawton just remark about it, that there would be this oversight for the first time, and it is somewhat of a grand, noble design. Your responsibilities would not be small.

I am going to pose the question and ask for the answer in writing. It has to do with the issue testified to before the Human Resources Subcommittee on the SF 180 now which became the SF 312.

Mr. Garfinkel. That is right.

Mr. Sikorski. That has to do with your current act of classification system and is the classified information nondisclosure agreement that people sign that they will not divulge any classified information. The big controversy there was classified or classifiable.

Under the new standard format, the 312 documents no longer had to be marked to be classified and if there is any doubt, an employee has a "duty to inquire."

The situation becomes if X employee gets a phone call from Nightline asking about an issue, that issue may entail documents which may or may not be classified, could be classifiable, may be in the process of being classified, X employee then has to squeal on the Nightline reporter to supervisor or security official—to supervisor. Supervisor Y, then smart under this system, would make a decision that it is not classified, but we have to run it through to see if it should be and automatically it is then treated like classified.

Supervisor Y then has to fill out a writing to security officer Z saying this inquiry has been made under this new system that we have proposed in the Executive order. Is that right so far?

Mr. Garfinkel. Well, if I might respond to that briefly, I think one of the reasons that you would have an oversight mechanism is to respond to more detailed situations than an Executive order is going to cover.

We can create any number of hypotheticals, including your hypothetical with the inquiry from Nightline, and it would be impossible for an Executive order to address that issue.

Mr. Sikorski. The point is, you put X, Y and Z into really difficult circumstances. And then, now, under this proposal, your office, which is dealing with the classification of documents, now becomes the ISOO on the hill of classified documents, plus, personnel security issues.

And, an individual who does not take a call from Nightline, but wants to talk to 60 Minutes or CNN, or someone, an investigative reporter for the Post or the Times or whomever, and let them know about fraud or security problems or safety problems at Savannah River, for example, that person is in a heck of a situation in protecting his or her responsibility under the law and to the code of ethics to disclose waste, fraud and abuse, and maintain his or her job, her classification, his ability to deal with documents.

It is not an easy question, but it is a bothersome one.

Mr. Garfinkel. Well, our role is an oversight body, not the policeman of the security classification system. Rather, an oversight office often sits in the middle ground and responds to issues where there are equities on both sides of the issue. And the situation you have described is not dissimilar to that.

So I do not know that there is an inherent conflict, because it is not the oversight role to serve as a policeman.

Mr. SIKORSKI. Answer it on the conflict issue, answer it on what happens when your role is increased on a geometric basis under this executive order, and the impact that has on the civil servant who wants to whistle blow.

And what would be the responsibility of X, Y and Z, the employee, the supervisor and the security officer under this new Executive order in that circumstance? And what would be the impact on CNN or Nightline or whoever's request for information?

My guess is you will find, they will get no information. Those employees are in jeopardy because someone called in. And the same thing would happen if a member of my staff or a member of Frank's staff called on an armed services issue.

Mr. SIKORSKI. I thank you very much. Do you have any parting comments? Ms. Lawton, do you have any parting comments?

Mr. MCCLOSKEY. Mr. Chairman, may I just ask one brief question?

Mr. SIKORSKI. Absolutely.

Mr. MCCLOSKEY. It may have been indirectly asked, but I do not remember whether it was ever directly asked. What are we going to do about an appeal right for someone denied a security clearance, the access or the upgrade, because of deliberately false and malicious information? What are their rights if they have no due process or access to their accusers?

And this does happen. We are not dealing with hypothetical.

Ms. LAWTON. Well, they have the rights under the Privacy Act to insist upon getting the record corrected.

Mr. SIKORSKI. Pardon me. Thank you for yielding.

What do they know about that? What do they know about the reasons? We are competing for a job with Garfinkel here, and I put a little bit into your record about some certain things. And you are denied the clearance. I eventually get the clearance and the promotion that that clearance opens the door for.

How will you ever know under your executive order with any certitude that you will be able to correct that information that is in the record that I put in there and is false?

Ms. LAWTON. But you can ask for your record at any time.

Mr. SIKORSKI. But how will you know the basis of the denial under your executive order?

Ms. LAWTON. By asking.

Mr. SIKORSKI. By asking? But under your executive order, you say they do not have to give it.

Ms. LAWTON. The Executive order is not the full universe of rights that exist.

Mr. SIKORSKI. We work for Rockwell International and on a black program. And right now, you have the right to be told why you were denied. Under your executive order, that right is revoked.

The only thing that you get is what they are willing to give. And you propose that muscle flexing is important for ease of decisionmaking.

Ms. LAWTON. We have provisions for notice.

Mr. SIKORSKI. But they can be waived at any point. First of all, you told me earlier that there is no notice for applying and for upgrading. It is only for revocation in the draft order, right?

So in this case, there is no notice there.

Ms. Lawton. Whether or not there is depends on the procedures to be issued. The order is to be implemented. The order is not a stand-alone system. It is to be implemented by agency regulations.

Mr. Sikorski. Why are you revoking the Eisenhower Executive Order of 1960 then?

Ms. Lawton. Because we are establishing a uniform procedure for all three areas.

Mr. Sikorski. But you do not uniformly give me the right to notice. In fact, you do not give me the right to notice.

Can you tell me in your executive order where I have the right to notice in that situation where you and I are competing?

Ms. Lawton. I do not have a copy with me.

Mr. Sikorski. Well, I do not think you can, because it is not there. And you already testified to it. Sections 7.2 and 7.3 uniformly eliminate procedural due process rights in all denial cases and the substantial curtailment of rights now offered contract employees in revocation cases.

Section 7.2 requires that a written explanation, et cetera, "shall be provided, except candidates for initial access or for access at a higher level." That is the fact situation.

Then, it goes on, in 7.3(a), to waive any additional rights are at the discretion of the agency head. So much for uniformity.

And then, 7.2 says, they will be waived—I'm sorry—any limited procedures under may be waived under 7.3(b). Right, so far?

I think you understand why we are so upset, because you think there is something in there that is not in there anymore. Maybe the draft, as you sent over at one point, had some notification and due process rights in there, but they are not in there anymore.

And maybe we have this confusion.

Ms. Lawton. Are you reading from the order or from what?

Mr. Sikorski. I am reading from an analysis of the order with quotes from the order.

Do you want a copy of the order?

Ms. Lawton. I have a copy of the order back at the office, but I do not know what analysis you are talking about.

Mr. Sikorski. Well, we will give you a copy here and you can use it to answer Frank's question.

Now, wait a minute. I am just reminded of something. You had some difficulty in coming here and testifying about a draft order. Does my question raise problems with that?

Ms. Lawton. If we start getting down into text, yes.

Mr. Sikorski. OK. Now I know why you did not bring the order. Can you explain to me how your notice is guaranteed under your order? You think it is guaranteed and I am saying that it is not there. And I think I am right.

Maybe you can provide a written response?

Ms. Lawton. You have completely confused me now.

Mr. Sikorski. Maybe you can provide a written response for the subcommittee on that issue? And we will get you a piece of the transcript, or if you have confusion as to what the fact situation is.

Mr. Sikorski. I would just ask you at this point if you would stay for the next panel, because these people live and breathe and eat this stuff. And they have the same questions with more articulation.

And so, if several of the points made thus far in this panel, questions raised, strike you as not accurate or not consistent with what you are attempting to do, they are more articulately explained by this next panel. If you would stay for them, the subcommittee would appreciate it.

Ms. LAWTON. Up to my next meeting, yes.

Mr. SIKORSKI. We thank you. We look forward to your written responses.

Let me just say that I think I have learned some things on this panel. I think I learned why it has taken 5 years. [Laughter.]

I think I have learned why it should take at least another 5 years before the due process rights are eliminated; or 5 years, plus a lot more years before that is contemplated.

I think that the goals of a better, more uniform system, easing the denial of access on a need-to-know basis are meritorious. I do not think the debate this morning has been on that. It has been on the minimal due process rights elimination. We are going to keep focusing on it. And it is a bipartisan concern here.

Thank you. Thank you both.

The last panel consists of Mr. Thomas Devine, who is the legal director of the Government Accountability Project, a nonprofit, nonpartisan public interest group that represents and advocates rights of whistleblowers.

Mr. Devine has played a major role in the advising of many staff people for the Government about whistleblower legislation during the past three years. We look forward to hearing his testimony this morning.

Joining him is Allan Adler, the legislative counsel for the American Civil Liberties Union.

Mr. Devine, you have provided the subcommittee with a very helpful 11 pages of testimony and a memorandum which states the concerns, which I was tempted to steal from earlier, but somewhat resisted. That will become part of the record as you have submitted it, without objection.

I would ask you to use your time to make your points, but especially, in light of what you just heard, on the rationale and on the effect of this proposed executive order, especially as it affects whistleblowers.

We are glad to have you here.

STATEMENT OF THOMAS DEVINE, LEGAL DIRECTOR, GOVERNMENT ACCOUNTABILITY PROJECT

Mr. DEVINE. Thank you, Congressman.

Frankly, I was astounded by the presentation of the first panel. This organization that created the draft Executive order proposes overturning 30 years of Supreme Court decisions and effectively saying that President Eisenhower was too much a civil libertarian. But they have not told us why.

We at the Government Accountability Project challenge the administration, before you try to take away this country's basic constitutional rights, commence a public debate on your grounds.

We applaud and say, thank goodness that is what you have begun this morning, Congressman.

GAP is pleased to debate with the administration on this issue, and we are glad to do it today. In fact, four of my colleagues are here to provide more detailed answers if needed.

Our general counsel, Joseph Kennedy, has been fighting national security abuses since the McCarthy era. And I would be glad to begin by going over some of the points that were raised by the first panel.

Ms. Lawton stated that the draft Executive order complements existing Executive orders; that it should be viewed as additive rather than substitutive. Not in terms of substance. It completely overturns the current system for interpreting the law. It is like going to the dark side of the Moon to see better. They have nothing in common with each other.

Second, she has stated that agencies do not have to go as far as this executive order permits. It is just a minimum floor. The point is, they can go that far. We thought that in a free society the Constitution established the minimum floors, not secret working groups.

Mr. SIKORSKI. Secret working groups being the groups that deny security?

Mr. DEVINE. The group that prepared this document within the Department of Justice. I am not privy to all of the participants.

Mr. SIKORSKI. I think they are in the testimony.

Mr. DEVINE. Yes.

Third, she distinguished between clearances and jobs. For 3.5 million workers, that is a totally sophist distinction. If you lose your clearance, you lose your job. We are not debating the Talmud here, although that might be easier understanding than the classification system. We are talking about whether civil servants generally, and whistleblowers in particular, can continue to support their families.

Fourth, she made the distinction between access and revocation, and said it is nothing personal if we do not give someone access. Well then, why aren't they clear about it? Why is it optional to say that this was nothing personal? Why don't we eliminate that confusion?

And finally, Ms. Lawton said that there are safeguards in existing law that we can turn to. That is the first area where I can go back to my prepared testimony to give a more detailed response.

We believe that this executive order would result in the demise of the Whistleblower Protection Act and existing statutory protections.

Retaliatory investigations and security clearance denials are not listed personnel actions under civil service law. The strengthened free speech protections in the Whistleblower Protection Act only apply to the specific personnel actions listed in the underlying statute. As a result, this draft executive order would be a neat vehicle to circumvent the new law and dispose of dissenters with impunity. Security clearance decisions are wholly discretionary under the proposed Executive Order and they can be made on retaliatory grounds that would be illegal under civil service law if you tried to fire that person.

The whistleblower's clearance can be yanked in secrecy without any basis communicated. For this available form of national security reprisal, neither the current laws nor improved whistleblower statutes offer any protection.

Now even if you did get your day in court, though, and you could go for a hearing before the Merit Systems Protection Board, you would not be assured of being able to make your case. The Merit Board will start routinely facing the same dilemma that has proved so frustrating in the North trial.

The executive can claim that it cannot and will not disclose its justification for removing an employee's clearance or firing that employee for violating things like the squeal rule in this Executive order. To do that, the executive could argue, would require release of unmarked classified information that could compromise the Nation's security. Unlike the North trial, however, the likely outcome is if that argument prevails, it is the employee who is going to be thrown out, not the Government's case.

Congressman, I would like to highlight in this testimony four themes that we think are of serious concern with the new Executive order. I have to confess that when we first received the invitation to participate, we thought this would almost be a very happy day. We are celebrating the announcement that the administration will not repeat last year's veto of the Whistleblower Protection Act.

There is an overwhelming and unprecedented mandate now shared by the Attorney General, congressional leaders, and even whistleblower support groups that the new legislation is better than the bill that was vetoed last year.

But this hearing concerns the specter of a proposed order that can totally cancel that bill's free speech shield, as well as all of the current remedies. It is an order that threatens to expand the nightmare of gag orders like standard form 189 into a way of life, and to continue rolling back our basic rights to the pre-McCarthy era.

Perhaps what is worst, and what the other staffers can help detail, is that repressive premises in this proposal are not limited to the back rooms of the Department of Justice; they reflect the contempt toward dissent that already exists and is manifested currently in background field investigations as part of the clearance system.

We can tell you numerous horror stories about what has happened there.

Let us go to the first issue, though, which is whether national security concerns justify formalizing the at-will doctrine for the civil service system. So let there be no mistake about it, that is exactly what we are debating today.

Even before the Executive order, Government employees had the right to know why their clearance was not permitted. They were entitled to a statement of reasons.

Under the proposed order, they are not. The decision can be made on any or no grounds. All that is required by the Government is to just say no.

Since 1960, employees have had minimal due process. Under the proposed Executive order, they would have none. It is a landmark proposal. In this light, it is particularly surprising that the proposal appears to be based on an empirical bluff, not on a national security crisis. You would think so.

Mr. McCloskey. An empirical what?

Mr. **Devine**. An empirical bluff rather than a national security crisis. And it is a bluff, because due process has an unblemished, 29-year track record of security clearance adjudications without having cleared a single traitor. That is about 900 hearings per year, which means we have had some 25,000 tests of the system of due process since it was created.

Why do we have to get rid of it? That continues to be a mystery. After the administration made their case this morning, the real impact of this proposal is to deprive Federal employees of a fighting chance to defend themselves. Despite very serious weaknesses in the current system, they have roughly a 50 percent success rate today.

By contrast, even with the prospect of a hearing to challenge unjust determinations, employees' success rate is roughly 20 percent for ex parte background investigations. Unfortunately, under the new proposal, that would be it. That is all you are entitled to.

The second issue is the demise of the whistleblower laws. I discussed earlier how this would hurt the Whistleblower Protection Act. But it would also cancel out all the other protection statutes currently on the books, such as the False Claims Act amendments.

The reason is the order creates a blank check for the Government's affirmative defense. Even if you prove a prima facie case of reprisal, the Government qualifies for a legitimate, independent alternative ground for its security clearance decision, no matter what. They merely have to say in our discretion we said no.

Third, we will be eliminating anonymous dissent with this executive order. And to fully appreciate that, it must read in conjunction with Standard Form 312, the successor to SF-189. The composite eliminates confidential disclosures and it creates what we call an anti-honor code in which whistleblowers must expose themselves and supervisors must turn in the dissenters.

Any violation is grounds for discharge under circumstances of questionable due process. This helps to explain what the administration was up to in Standard Form 312. That was a first step leading toward this system.

The final area I would like to discuss is the vulnerability to whistleblower reprisal under current law. Things are not so good today. There are two conclusions from a cursory review of initial results from recent GAP investigations.

First, the public badly needs the message of whistleblowers who have security clearances. For many who live in neighboring communities to nuclear weapons plants, it is a matter of life and death.

Second, the track record of retaliatory clearance investigations leaves no doubt that to retreat to that vehicle in isolation would be counterproductive. It would be a weapon to attack loyal dissenters, rather than to determine the truth about national security status.

Whistleblowers at nuclear weapon plants alone have exposed hazards such as 500,000 pounds, a quarter ton, 500,000 pounds of uranium emissions at one plant alone; the sale of an abandoned facility for use as a food warehouse, although the building was still hot; radioactive pavement in the company parking lot releasing 4 million pounds, or 2 tons, of carcinogenic, ozone-depleting carbon tetrachloride at another facility; and dumping 10,000 gallons of liquid radioactive waste into the local river.

They've discovered fraud involving Government equipment to produce private, black market products, such as manufacture of gold and silver-plated jewelry, wine presses, a $20,000 grandfather clock, a still, belt buckles, and a $15,000, hardwood staircase smuggled out by employees in pieces.

Employees who disclose these practices were committing the truth. But they were treated as if they had committed a crime.

To illustrate, current background security investigators have engaged in tactics such as, without prior warning, sequestering the whistleblower in a room and interrogating him about incidents that occurred 15 to 20 years ago that had never been raised before; ordering them to sign interview consent forms; and denial of the right to counsel before participating in an investigation under threat that, otherwise, their clearance would be revoked on the spot; telling them in advance that the investigator had already decided to revoke the whistleblowers' clearances; aggressive questions to see if the employee had contacted Congress; threatening revocations over $15 good-faith mistakes on travel reimbursements; false accusations of drug dealing; orders to take mandatory psychiatric fitness-for-duty examinations; or as a condition of maintaining clearance, requirements to sign gag orders agreeing to private restraint that makes SF-189 look civilized. They would have to agree to prior restraint before contradicting management in any setting about any statement relative to the facility. That is up at the Knolls Atomic Power Laboratory run by General Electric and the Department of Energy.

The loss of due process is a threat to all government and contractor employees, not just whistleblowers. This proposed executive order effectively eliminates the premises of *Greene* v. *McElroy,* as well as the philosophy of our nation that President Eisenhower made so well in a 1953 speech: "If we are going to be proud that we are Americans, there must be no weakening of the code by which we have lived: the right to meet your accuser face to face."

Thank you.

[The prepared statement of Mr. Devine follows:]

TESTIMONY OF THOMAS DEVINE,
GOVERNMENT ACCOUNTABILITY PROJECT

Mr. Chairman and Members of the Subcommittee:

Thank you for inviting my testimony today. My name is Thomas Devine, and I am the legal director of the Government Accountability Project (GAP). GAP is a nonprofit, non-partisan public interest organization that represents and advocates strengthened rights for whistleblowers, those government or corporate employees who disclose violations of law, public health threats or other abuses of power where they work.

Consistent with the importance of the issue covered by today's hearing, a record number of my GAP colleagues assisted in preparing this testimony and are here to provide detailed answers for points summarized in this statement. Our General Counsel, Judge Joseph Kennedy, has been fighting national security threats to due process since the McCarthy Era. Three other GAP attorneys, Thomas Carpenter, Joseph Libertelli and Ed Slavin, have interviewed 46 employees during investigations of whistleblower reprisals at nuclear weapons facilities. A legal memorandum by Mr. Slavin is attached which analyses the threat posed by the proposal to numerous constitutional freedoms. Mr. Slavin's memorandum also contains 18 recommendations for legislative reform of the legal system for security clearance determinations, even if the proposed EO were withdrawn. This statement summarizes GAP's concerns.

Two days ago free speech advocates celebrated the announcement that the administration will not repeat President

Reagan's 1988 veto the Whistleblower Protection Act. A letter of support from Attorney General Thornburgh on behalf of the Administration eliminates the last foreseeable roadblock to approval. The Attorney General, congressional leaders and even whistleblower support groups all view the 1989 legislation as even better than the bill that was approved unanimously last year. This is an overwhelming mandate both on behalf of freedom of dissent and the public's right to know.

Unfortunately, today's hearing concerns the specter of a proposed executive order that threatens to totally cancel the Whistleblower Protection Act's free speech shield, as well as the remedies in all current federal whistleblower protection statutes; to expand the nightmare of gag orders like Standard Forms 189 and 312 into a way of life; and to continue rolling back basic rights to pre-McCarthy Era depths. By coincidence, the proposal became publicly known at the same time GAP was intensifying an investigation into retaliatory security clearance investigations and revocations against whistleblowers at nuclear weapons facilities. Perhaps most frightening, the repressive premises in the proposed executive order reflect the contempt toward dissent that already exists and is manifested in background field investigations. A review of four themes illustrates our belief that the proposed EO reflects a clear and present danger that already exists to freedom of speech, and due process generally.

REVIVAL OF THE "AT WILL" DOCTRINE

Even before President Eisenhower issued Executive Order 10865 in 1960, government or contract employees had the right to know "why" their security clearance was not granted. They were entitled to a Statement of Reasons. Under the proposed EO they aren't. Although in many instances the decision is dispositive for professional survival, it could be made on any or no grounds. The Executive branch has total discretion not to explain itself. All that would be required is to "just say no." In short, the issue is whether national security concerns justify formalizing the "at will" doctrine for the civil service system.

Since EO 10865, employees have had minimal due process. Under the proposed EO they would have none. No process means that secret innuendos can end employees' careers on grounds as broad as the human capacity to condemn. In short, this is a landmark proposal to suspend civil rights and the civil service system, and return to the constitutional Dark Ages.

In that light, it is astounding that the proposal is not based on a national security crisis. Rather, it appears to be based on an empirical bluff. Due process has an unblemished 29 year track record of security clearance adjudications, without having "cleared" a single traitor. Practitioners and hearing examiners inform me that there are some 900 hearings per year, which means roughly 25,000 hearings where we have been able to retain due process without attacking national security. Why do we have to make this choice?

The real impact of this EO would be to deprive employees of a fighting chance to defend themselves. I am informed that despite the serious weaknesses in the current hearing structure, employees have roughly a 50% success rate on appeal due to their ability to confront accusers, exercise some control over development of the record, and present evidence of rehabilitation. By contrast, even with the prospect of a hearing to challenge unjust determinations, employees' success rate is roughly 20% for ex parte background investigations. Under the proposed EO, those "no process" investigations would have a monopoly for development of the record. As the ongoing angst of the Senate demonstrates, the ex parte investigation like the Star Chamber is the bone of freedom and the antithesis of fundamental fairness.

DEMISE OF THE WHISTLEBLOWER PROTECTION ACT

Unfortunately, retaliatory investigations, and security clearance denials or revocations are not listed personnel actions under 5 USC section 2302(a). The strengthened free speech protections in the Whistleblower Protection Act only apply to personnel actions that are specifically listed. As a result, the proposed Executive Order offers a neat vehicle to circumvent the new law and dispose of the dissenter with impunity. Since security clearance decisions are wholly discretionary under the proposed EO, they could be made on retaliatory grounds that would be illegal under civil service law. The whistleblower's clearance can be yanked in secrecy, without any basis communicated. In short, for this available form of national security reprisal, neither the current or improved whistleblower statutes offer any protection.

Other whistleblower protection statutes, such as in the False Claims Act Amendments, also would be rendered meaningless. This is the case because under the proposed EO any or no reason qualifies as a legitimate, independent, alternative ground justifying the clearance decision, even if a *prima facie* case of reprisal were established.

ELIMINATION OF ANONYMOUS DISSENT

To fully appreciate the threat to freedom of speech, the proposed Executive Order must be read in conjunction with the obligations imposed by Standard Form 312, successor to the controversial nondisclosure agreement SF 189. The composite effect is the elimination of confidential disclosures and creation of an "anti-honor code." Under the combined system, whistleblowers must expose themselves and supervisor must turn in the dissenters. Any violation of this mandatory confession/squeal rule itself is grounds for discharge under circumstances of questionable due process. The combined system helps to expose the purpose behind the employee obligations in SF 312.

The process begins when a whistleblower intends to dissent on national security issues. Under SF 312, documents no longer have to be marked to be classified, and if there is any doubt an employee has a "duty to inquire," i.e., must "ask the boss." Further, the employee consistently must seek the agency's prior determination and approval on grounds that the potential recipient, including Congress, has a "need to know" the information.

Under section 8.4(a), employees would have to prepare written challenges of all "questionable requests for access eligibility or need to know determinations," as well as "all contacts with any persons who appear to be interested in obtaining, or who are attempting to obtain, unauthorized access to classified information...." A co-workers or supervisor's failure to turn in the whistleblower seeking evidence or permission for disclosures itself would violate section 8.4(a), which also requires anyone aware of the oversight to turn in the supervisor who hadn't complied by exposing the whistleblower. In short, this proposal is only five years behind the philosophy in 1984, that everyone is an agent of Big Brother.

Under section 8.5, violations include liability for adverse actions. Even if proposed personnel actions were adjudicated under civil service law before the Merit Systems Protection Board (MSPB), however, the employee would not be assured of a day in court. The Board will face the same dilemma that has proved so frustrating in the North trial. The Executive may claim that it cannot and will not disclose its justification for proposing to fire an employee, because that would require release of unmarked, classified information. Unlike the North trial, the likely outcome if that argument prevails is that the employee will be thrown out, not the government's case.

In short, the nondisclosure agreements and the proposed

Executive Order mesh like pieces in a puzzle. The combined proposal illustrates the Pandora's Box inherent in the government's position at the North trial that markings to provide notice of liability for disclosing classified information merely represent a "metaphysical distinction."

The EO also would invite encore performances to Standard Forms 189 and 312. And the Information Security Oversight Office (ISOO) director would be promoted from being point man for a particularly repressive gag order, to a new role as government secrecy czar and leader of an expanding bureaucracy to carry out his mandate during a period when government generally is cutting back. Under section 8.2, ISOO would be responsible for overall implementation of the proposed EO. Under section 8.2(h) ISOO would have the "authority to prescribe ... standard forms that will promote the implementation of an effective federal personnel security program."

The whimsical natureof classification determinations wasdocumented by the Stillwell Commission and confirmed as recently as last Monday when Judge Gesell pointed out the "absurdity of a situation in which the press is accurately reporting information in the public domain while the court is cofronted with representations that the same facts must never be officially acknowledged." In response, the New York Times quoted ISOO Director Steven Garfinkel as saying:

> It is not surprising to find the same document censored differently, and to find it divulged information that earlier was deemed classified, as it passed through the hands of government security

> officials ... There's a great deal of subjectivity in any classification review procedure. It's not a question that has black and white answers.

To leave an individual's career at the mercy of such a regime is the height of tyranny.

In short, the proposed EO promises to spark a new proliferation of Standard Forms imposing secrecy in civil service, analagous to the proliferation of National Security Decision Directives imposing secret law.

VULNERABILITY TO WHISTLEBLOWER REPRISAL UNDER CURRENT LAW

A cursory review of initial results from GAP's investigation of security clearance investigative harassment of whistleblowers requires two conclusions: (1) The public badly needs the message provided by whistleblowers at nuclear weapons plants. For many who live in neighboring communities, it is a matter of life and death. (2) The track record of retaliatory clearance investigations leaves no doubt that remedy in isolation would be counterproductive, a vehicle to attack loyal dissenters rather than to determine the truth.

Whistleblowers at nuclear weapons plants have exposed environmental hazards such as --

* 500,000 pounds of uranium emissions around one plant alone;

* sale of an abandoned facility for use as a food warehouse, although the building was still "hot";

* radioactive pavement in the company parking lot;

* release of some four million pounds of carcinogenic, ozone-depleting carbon tetrachloride at another facility;

* dumping 10,000 gallons of liquid radioactive waste into a

local river;

* failure to clean internal air filters over a thirty year period inside a plant;

* inadequate internal air circulation and a broken air sampler for a period of years;

* occupational radiation overexposure to workers, contrary to records asserting they were within legal limits;

* lack of proper procedures and inaccurate engineering drawings that could cause criticality or exacerbate an accident;

* improper disposal techniques for high-level radioactive wastes; and

* fraud involving use of employee work time and theft of government equipment to produce products for private black markets, including manufacture of gold and silver-plated jewelry, wine presses, hundreds of lavish memorial plaques, a $30,000 still, a $20,000 grandfather clock, a $20,000 mobile home jack, medallions, pen and pencil sets, belt buckles, earrings, necklaces and a $15,000 hardwood staircase smuggled out by employees in pieces.

Employees who disclosed these practices were "committing the truth" in a manner that benefited the public interest without compromising national security. They deserved acclaim for their courage. Instead, they were treated as if they had committed a crime. To illustrate, victims of retaliatory security clearances investigations have reported tactics such as --

* without prior warning, being sequestered in a room and interrogated about incidents 15-20 years ago that had not been raised previously;

* orders to sign an interview consent form and denial of the right to call counsel before participating in an investigation interview, under threat that otherwise the employee's security clearance would be revoked on the spot;

* advance announcement by the investigator that he already had decided to revoke the whistleblowers' clearances, before he began the interviews;

* aggressive questioning during the clearance interrogation

to determine whether the employee had communicated with Congress;

* reopening a security investigation within days of learning the employee had communicated with Congress;

* accepting at face value inaccurate but damaging information that had been slipped into a personnel file without the employee's knowledge;

* accusations that the whistleblower had participated in a conspiracy by delaying at all before contacting authorities;

* threatening clearance revocation and prosecution over a good faith mistake involving a $15 reimbursement discrepancy.

* false accusations of drug dealing;

* false accusations of participating in gambling rings;

* orders to take a mandatory pyschiatric fitness-for-duty examination or be fired; and

* as a condition of maintaining clearance, a requirement to sign a gag order agreeing to prior restraint before contradicting management in any setting about any statement relative to the facility.

The loss of due process is a threat to all government and contractor employees, not just whistleblowers. The proposed Executive Order effectively eliminates the legal premise of Greene v. McElroy, 360 U.S. 474 (1959), and the philosophy of our nation that President Eisenhower made so well as he recounted the values of his Abilene, Kansas hometown in a November 23, 1953 speech to the Anti-Defamation League:

> Meet anyone face to face with whom you disagree. You could not sneak up on him from behind ... without suffering the penalty of an outraged citizenry.... If we are going to be proud that we are Americans, there must be no weakening of the code by which we have lived: the right to meet your accuser face to face.

The Administration's response to this proposed Executive Order will represent immediately will determine if President Bush has abandoned that value. Events of the last few weeks have made it clear he still holds it for high public officials such as Senator Tower. His response to the proposed Executive Order will reveal whether the President still defends that value for whistleblowers, and for Americans generally.

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GOVERNMENT ACCOUNTABILITY PROJECT
25 E Street, N.W., Suite 700
Washington, D.C. 20001
(202) 347-0460

MEMORANDUM
March 7, 1989
To: Thomas Devine
From: Ed Slavin
Re: Analysis of proposed executive order on personnel security

The proposed Executive Order (EO) on security clearance decisions would significantly erode guarantees of fairness and Due Process that have existed for the past 29 years, since President Eisenhower signed Executive Order 10685 on January 17, 1960, in response to the Supreme Court's decision in Greene v. McElroy, 360 U.S. 474 (1959).

The proposed EO is based on the premise that termination of access to information is "a wholly discretionary determination that is independent of the personnel decision whether a person is suitable for federal employment." This premise is fundamentally wrong. Denial of a security clearance is a permanent bad mark against a person's character and career -- and one that can prevent that person from ever getting responsible employment anywhere. As Chief Justice Earl Warren wrote of the successful plaintiff in Greene v. McElroy, he:

> was discharged from his employment solely as a consequence of the revocation [of his security clearance] because his access to classified information was required by the nature of his job. After his discharge, Petitioner was unable to secure employment as an aeronautical engineer and for all practical purposes that field of endeavor is now closed to him.

Greene v. McElroy, 360 U.S. 474, 475-6 (1959). Unable to work as an aerospace engineer, the aggrieved plaintiff was forced to work as an architectural draftsman, at less than a third of his former salary. The plaintiff in Greene v. McElroy was unlawfully denied his Due Process rights, and his security clearance was revoked on the grounds he had associated with alleged Communists and Communist Front members who were friends of his ex-wife. In denying the security clearance, the Defense Department relied on reports, informants and witnesses the plaintiff, a corporate vice president and general manager of Engineering and Research Corp. (ERCO), whom the plaintiff was never allowed to cross-examine or confront.

Greene v. McElroy found the Defense Department's system of unconstitutional, as the system was not authorized by Congress or the President. (The court chose not to reach the constitutional question of Due Process denial because of that lack of authorization from Congress and the President.) In response some seven months after Greene v. McElroy was decided, President Eisenhower issued his Executive Order 10685, requiring hearings, appeals, and cross-examination.

President Eisenhower's Executive Order 10685 today provides some slim assurance that "whistleblowers" will not be harassed and fired under color of security clearance issues. If President Eisenhower's Executive Order 10685 were to be revoked -- as the proposed Bush executive order would do -- there would be a clear and present danger to Government and contractor employee's First Amendment rights, and to their ability to expose fraud, waste, mismanagement and threats to public and worker safety and health. This repressive new initiative comes just as abuses of the current system are exposing it as too weak in guarding against politicization and reprisals.

Despite President Eisenhower's Executive Order 10685 -- and despite limited guarantees of fairness under current procedures for hearings before agency employees supervised by prosecutors -- "whistleblowers" are harassed with threats to remove their security clearances as a result of revealing fraud and mismanagement by the government and its contractors. For example, in recent months there have been actual or threatened reprisals involving security clearances against "whistleblower" employees of at least four Department of Energy (DOE) facilities -- Rocky Flats, Colorado; Hanford, Washington; Knolls Atomic Power Laboratory, Schenectady, New York; and Feed Materials Production Center, Fernald, Ohio. These threatened reprisals and life-threatening DOE activity "whistleblowers" attempted to disclose reveal the big environmental, safety and health and government contractor misconduct issues at stake if employees are denied hearings in security clearance revocations. The Department of Energy is a synecdoche -- a part that stands for the whole -- of why honest, loyal "whistleblower" Government and contractor employees should not be forced to live in fear of arbitrary pretextual security clearance revocations the new order would encourage.[1]

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[1] Nuclear weapons production already exists in a climate of secrecy that has deterred workers from disclosing environmental health problems, including those that may now cost from $100 to $200 billion to clean up. The proposed executive order would further deter disclosures by workers about outrageous mishandling of radionuclides, heavy metals and other toxic materials that threaten worker and public safety and health. With the Energy (continued on next page)

The balance of this memorandum consists of three parts: (1) a critique of the legal and policy defects in the proposed executive order, (2) proposals for legislation to cure the present unfair system of deciding who is a "security risk," and (3) conclusions.

(footnote continued from previous page) Reorganization Act "whistleblower" provision, 42 U.S.C. § 5851, currently interpreted as protecting only nuclear powerplant workers, but not nuclear weapons plant workers -- and with significant cultures of secrecy and fear through four decades of nuclear weapons production -- the proposed executive order could hammer the last nail into the coffin of free speech for nuclear weapons plant workers. As the Occupational Health Legal Rights Foundation, AFL-CIO, has reported:

> Secrecy works hand in hand with unsafe workplaces: if a worker is afraid of losing his or her job and security clearance over complaints about safety and health, conditions in the plants will not be as safe as they could be in an environment of openness and candor. Secrecy has meant in practice that workers have less control and influence over the safety of nuclear weapons plants than do workers at other industrial plants. This lack of control lets unsafe conditions exist.

Occupational Health Legal Rights Foundation, "Worker Health Issues at Nuclear Weapons Plants," A Report to the Nuclear Workers Annual Meeting, Amarillo, Texas, December 15, 1988. In supporting private sector "whistleblower" legislation, the American Bar Association Young Lawyers Division has stated:

> If nuclear weapons plant contractor employees ... felt free to "blow the whistle" ten years ago, the cost of the DOE cleanup might have been vastly lower at a time of national concern about the national debt. Further, earlier disclosures might have reduced the exposure of employees and citizens to toxic substances, and might have avoided an unplanned halt of DOE's tritium production.

Report Accompanying ABA Young Lawyers Division Resolution YL-3 (February 3, 1989)(Information only; resolutions are not policy of the American Bar Association until adopted by the House of Delegates). Adoption of the proposed executive order would threaten public and worker safety and health at nuclear weapons installations by effectively "gagging" employee disclosures of hazards.

I. WHAT'S WRONG WITH THE PROPOSED EXECUTIVE ORDER

Preamble: The preamble to President Eisenhower's Executive Order 10865 contains clear language recognizing individual rights, to wit:

> ... it is a fundamental principle of our Government to protect the interests of individuals against unreasonable or unwarranted encroachment...

In sharp and marked contrast, the proposed Bush executive order contains no recognition of the individual rights of government and contractor employees. Instead, the proposed executive order is directed solely toward an exaggerated concern with protecting national security from perceived dangers.

Denial of Statement of Reasons, Hearings, Cross-examination and Confrontation: Under the current system, there is a right to a hearing, although it is not before an independent Administrative Law Judge. Hearing Examiners and the Appeal Board of the Directorate for Industrial Security Clearance Review have completely inadequate decision-making independence structurally, and have often been under extreme pressure to decide cases in favor of the government. Still, two million defense contractor employees have a right to a Statement of Reasons why their security clearance is proposed to revoked, the right to appear before a Hearing Examiner, the right to confront and cross-examine witnesses, and a right to appeal to the Directorate for Industrial Security Clearance Review Appeals Board. While there are serious questions about the adequacy and independence of the current system, it does at least provide for hearings and appeals, with agency officials having the chance to assess personally the credibility of witnesses.

As a radical change in policy, the proposed Bush executive order contains no requirement for hearings. §§ 7.2, 7.3. Instead, there would be merely a "paper review," no substitute for a hearing, cross-examination and confrontation. Even the limited and questionable "right" to a "paper review," and to notice of the reasons for revocation of a security clearance could be wrested away at will -- "waived in whole or in part where ... [an] agency ... determines in writing that to provide such procedures would not be consistent with the national security interests of the United States." § 7.3(b).

There is a grave Constitutional question as to whether the President can close the courthouse doors to employees deprived of their jobs without minimal Due Process protection. In Webster v. Doe, 100 L. Ed 2d 832 (1988), Chief Justice Rehnquist wrote for the Supreme Court that Congress did not preclude litigation of "colorable constitutional claims" when it gave the Director of

Central Intelligence powers to dismiss any CIA employee "whenever he shall deem such termination necessary or advisable in the interests of the United States." The plaintiff employee, a gay man, alleged he was fired in violation of his Constitutional rights. The Court held Congress could not preclude judicial review under the Administrative Procedure Act of colorable Constitutional claims. If Congress could not bar CIA employees from litigating alleged violations of their rights, how then can the President purport to do so with the proposed executive order?

The executive order, at § 7.3(a) would give agency heads the "sole discretion" to provide for hearings, cross-examination or other procedures, but the section makes clear:

> [t]hese additional procedures are not required, however, and this section is intended to create no procedural or substantive rights.

The right to confront your accusers is a basic American right. It is what distinguishes democracy from totalitarian countries -- the very totalitarian countries the proposed executive order would have us imitate. As President Eisenhower, signer of the current Executive Order 10685, told the Anti-Defamation League of B'nai B'rith on November 23, 1953, the fundamental American value he grew up with in Abilene, Kansas, was:

> Meet anyone face to face with whom you disagree. You could not sneak up on him from behind ... without suffering the penalty of an outraged citizenry. If we are going to be proud that we are Americans, there must be no weakening of the code by which we have lived: the right to meet your accuser face to face.

A. Lewis, "Victim of Nameless Accusers," New York Times, March 2, 1989 at A27. As Pulitzer Prize winning columnist Anthony Lewis writes, "A system that operates on secret charges is an invitation to the grudge and the smear. It allows those with motives of jealousy or politics to destroy reputation. It permits even innocent mistakes to be destructive....." Id. The radical, reactionary nature of the proposed Bush executive order would be a serious departure from our proud American jurisprudential tradition:

> For two centuries, common law judges and lawyers have regarded the opportunity for cross-examination as an essential safeguard of the accuracy and completeness of the testimony, and they have insisted that the opportunity is a right and not a mere privilege.

McCormick on Evidence (3d Ed. 1984) § 19 at 47.

As Chief Justice Warren wrote for the Supreme Court in Greene v. McElroy:

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty, or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right "to be confronted with the witnesses against him." This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, e.g. Mattox v. United States, 156 U.S. 237, 242-244; Kirby v. United States, 174 U.S. 47; Motes v. United States 178 U.S. 458, 474; In re Oliver, 333 U.S. 257, 273, but also in all types of cases where administrative and regulatory actions were under scrutiny. E.g. Southern R. Co. v. Virginia, 290 U.S. 190; Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 292; Morgan v. United States, 304 U.S. 1, 10; Carter v. Kubler, 320 U.S. 243; Reilly v. Pinkus, 338 U.S. 200. Nor, it has been pointed out, has Congress ignored these fundamental requirements in enacting regulatory legislation. Joint Anti-Fascist Refugee League v. McGrath, 341 U.S. 168-169 (concurring opinion).

Professor Wigmore, commenting on the importance of cross-examination, states in his treatise, 5 Wigmore on Evidence (3d Ed. 1940) § 1367:

> For two centuries past, the policy of the Anglo-American system of Evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law. The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement (unless by special exception) should be used as testimony until it has been probed and sublimated by that test, has found increasing strength in lengthening experience.

360 U.S. at 496-97. The proposed executive order would unwisely ignore over 200 years of American public policy, safeguards, truth-finding and judicial experience inherent in cross-examination. It would set up an un-American system the Supreme Court and President Eisenhower both roundly rejected -- one where:

> not only is the testimony of absent witnesses allowed to stand without probing questions of the person under attack which often uncover inconsistencies, lapses of recollection, and bias, but in addition, even the members of the clearance boards do not see the informants or know their identities, but normally rely on an investigator's summary report of what the informant said without even examining the investigator personally.

360 U.S. at 497-98. The proposed executive order would replace fundamental fairness with national security secrecy, subjecting millions of innocent, hard-working employees to termination of their jobs for wrongful reasons -- or no reason at all.

The proposed executive order's denial of the right to hearings, cross-examination and confrontation would cause grave injustice and threaten employees' rights to dissent. This threat to the right to dissent and disclose wrongdoing would have an especially acute effect on public confidence in the ongoing effort to clean up Department of Energy nuclear facilities. For example:

o the Department of Energy might decide to revoke a "whistleblower" employee's security clearance for revealing an instance of toxic poisoning of workers and citizens, and determine that it will keep its reasons secret. DOE might decide secretly that its bureaucratic interest in concealing this poisoning is such that to notify the employee of its reasons "would not be consistent with the national security interests of the United States."

o the Department of Energy contractor embarrassed by "whistleblower" employee exposures of systematic contract fraud might seek to have security clearances revoked on the basis of employee conduct in college. (This has already happened at one DOE facility over environmental health issues). Such self-serving action would not be appealable, and the employee would never learn the reasons for it, under the proposed Bush executive order.

Vague, Overinclusive, Overbroad Non-Standards: Current Directorate for Industrial Security Clearance Review (DISCR) and other regulations contain standards for adjudication, including factors to be considered in mitigation of conduct that might otherwise revoke a security clearance. For example, Defense Directive 5220.6 lists five mitigating factors in cases of "Financial Irresponsibility," six in cases of "Criminal Conduct," and four regarding "Sexual Misconduct." Under current law and regulation, there has been at least some de minimis attempt to define terms and what constitutes derogatory information that could cause a security clearance to be revoked, thereby providing some slim assurance of some degree of logical consistency and predictability.

Under the proposed Bush executive order, vague standards would be the rule, subjecting employees to the possibility of reprisal for "whistleblowing" activities, and to supervisorial fiat that would act as a chilling effect on their right to free speech and to live their own personal lives without government interference. For example, consider the sweeping and vague standard that § 2.1(b) of the proposed Bush executive order would set up:

> eligibility for access to national security information shall be granted only to United States citizens as to whom a background investigation has been completed and whose personal and professional history indicates loyalty to the United States, strength of character, trustworthiness, reliability, discretion and sound judgment, as well as demonstrated freedom from conflicting allegiances and potential for coercion, and willingness to abide by regulations governing the use and handling of national security information.

In § 6.1, the "General Adjudication Criteria" are so "general" that they would allow unbridled discretion on the part of those agency officials and corporate managers desiring to repress dissent or discriminate against employees for personal life factors unrelated to employee performance. That section states:

> Among the factors to be considered in determining whether access to national security information should be granted or continued are whether the individual (1) has exploitable vulnerabilities or has engaged in any exploitable conduct or indiscreet behavior; (2) has demonstrated trustworthiness, reliability, excellent character, and judgment; (3) has engaged in criminal or dishonest activity, alcohol or substance abuse, or exploitable sexual conduct; (4) has a history of mental, emotional and financial stability; (5) is of unquestioned loyalty to the United States and not susceptible to undue influence, coercion or duress.

The standards are so vague that virtually any person could have their security clearance revoked because of it. For example, the perceived lack of any characteristic on the laundry list of Boy Scout virtues ("trustworthiness, reliability, excellent character, and judgment") could subject any employee to security clearance revocation by one in authority who merely disapproves of the employee's dissent about professional matters (e.g., whether to keep government or contractor misconduct a classified national security secret) or whether the supervisor disapproves of the employee's personal associations, political views, lifestyle.

What might be deemed "trustworthiness, reliability, excellent character, and judgment" by one supervisor or security "expert" might not be by others. Rather than an attempt at achieving an objective standard that lists exacerbating and mitigating factors (such as the current Defense Directive 5220.6), the proposed Executive Order proposes entirely subjective non-standards that would set a trap for the unwary. The non-standards would allow officials and executives guilty of misconduct (such as environmental pollution at Department of Energy nuclear weapons plants, government contract fraud, violations of the Boland Amendment such as those involving the National Security Council under Col. Oliver L. North) to reach out and crush someone -- or anyone and everyone -- who dissents, or whose personal life they didn't like.

By rejecting current standards, the proposed executive order would create an administrative law nightmare, allowing mere subjective preferences and prejudices of supervisors to justify revocation of security clearances based on private conduct that does not threaten national security. For example, if a happily married employee with strong religious or personal views against adultery were to engage in a "one-night stand" on one occasion, this might be an "exploitable vulnerabilit[y]" or "sexual misconduct" (and might, depending on state sodomy laws in half the states include conduct constituting "criminal activity" proscribed under the Adjudication Guidelines). As a result, under the proposed EO's non-standards, if a dissenter had ever engaged in a "one-night stand," he or she could be subjected to security clearance revocation -- with no explanation.

Similarly, susceptibility to "undue influence, coercion and duress" could afflict _any_ holder of a security clearance (for example, if a spouse, child or other loved one were kidnapped). The non-standard is not at all phrased in terms of "unusual" or "heightened" susceptibility. Under this overbroad non-standard, an executive or manager could conceivably find a "whistleblower" was susceptible to "undue influence, coercion and duress" simply because he or she loved his or her loved ones, and would not want to see them harmed if they were kidnapped by terrorists -- a contingent vulnerability, but a vulnerability nonetheless. Without a Statement of Reasons, the revocation would not be appealable, and the basis would be secret.

Potential Threat to Freedom of Association: Under current procedures, employees are not required to disclose membership in peaceful political groups. Under § 6.1(c) of the proposed executive order, illegitimate intrusions into employees' freedom of association and personal lives would be fostered and encouraged:

> Executive branch security officials should also consider the activities of **any** persons or **groups** with which the individual is bound by ties of affection, or with whom the individual is in close and continuing contact, and the activities of any person in the individual's immediate family to determine the individual's susceptibility to influence, coercion or duress. Also to be considered are whether or not any such persons are foreign nationals, maintain dual citizenship, or residence in a **foreign country**. [Emphasis added]

Subsection 6.1(c) would interfere with Americans' fundamental right to freedom of association, subjecting employees to second-guessing about their membership in political organizations, as well as the personal lives of their families, friends and loved ones. For example, this would legitimize security officials "considering" a "whistleblower" Department of Energy contractor employee's membership in peaceful political groups -- such as Environmental Action, Greenpeace, Friends of the Earth, Sierra Club, Natural Resources Defense Council, the American Civil Liberties Union, Young Americans for Freedom, People for the American Way, Common Cause, Eagle Forum -- or other groups about which the Government has no business asking questions of private citizens or government employees, or rendering Governmental judgments.

Significantly, current security forms do not require employees to report their involvement in political groups, yet the proposed executive order is so expansive in its sweep that it would authorize such a significant intrusion. It is "hornbook law" that Americans have a "fundamental right" to freedom of association:

> This right cannot be limited by the government unless the limitation serves a compelling governmental interest unrelated to the suppression of ideas and this governmental interest cannot be furthered through means which are significantly less restrictive of the associational or expressive freedom.

Nowak, Rotunda & Young, Constitutional Law, (3d. Ed. 1988), § 16.41 at 948. In addition to political, social, economic, educational, religious and cultural groups, the freedom of association also embraces "the freedom to choose one's spouse and to maintain a relation with members of one's family." Id. Threats to fundamental rights such as freedom of association are reviewed by the courts with "strict scrutiny" in analysis under the Due Process clause.

Potential Threat to Right to Travel: Two provisions are relevant here. Section 8.4(b) of the proposed EO requires supervisors to consider "suspicious foreign travel," § 8.4(a)(2) requires reporting of all employee foreign travel, while § 6.1(c) would also legitimize intrusions into employees' families' exercise of their Constitutional right to travel to non-Communist countries, since it lists residence in a foreign nation as a relevant factor. The potential for abuse is broad. Security officials could "consider" the fact an employee's daughter is an exchange student abroad, and to use this harmless "fact" to revoke a "whistleblower" security clearance without a Statement of Reasons.

As Justice William O. Douglas wrote for the Supreme Court majority, in Kent v. Dulles, "The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment." Kent v. Dulles, 357 U.S. 116, 125 (1958). Here, an employee could be harassed and his security clearance could be taken away without a hearing or cross-examination merely because he (or one close to him) travelled, studied or lived abroad, an ex post facto threat to exercise of the right to travel. Under such a regimen, employees who hold security clearances -- and their families and loved ones -- might hesitate to travel or study abroad because some mindless or vengeful security official might one day find that travel was "suspicious" or questionable.

"Squeal" Rules: There are two "squeal rules" in the proposed executive order: both threaten civil liberties. There would be substantial penalties for violations of both "squeal" rules, including "reprimand, suspension without pay, removal and other sanctions." § 8.5(b)

The first "squeal rule" in the proposed executive order would require employees with security clearances to "squeal" on Congressional investigators or investigative reporters who are investigating possible government and contractor misconduct; § 8.4(a)(1) requires that holders of security clearances:

> shall report to appropriate security officials all contacts with any persons who appear to be interested in obtaining, or who are attempting to obtain, unauthorized access to classified information.

The regulation makes no effort to exclude contacts that are not potentially suspicious or potentially from an agent of a foreign power. It is therefore overbroad and interferes with the First Amendment rights of employees. Consider the implications:

o Since it is so broadly written, the proposed Bush executive order would therefore require employees to disclose, for example, a telephone call from reporter Bob Woodward of the Washington Post attempting to learn the details of unlawful sales of arms to the Ayatollah Khomeini and the Nicaraguan Contras.

o It would also require a Department of Energy or contractor employee to disclose a confidential official contact by a Senator or a Congressional investigator who was seeking to learn the whole truth about "classified" pollution, for example, of the Ogalalla Reservoir by the DOE's Pantex Nuclear Weapons Plant near Amarillo, Texas, (a seriously contaminated aquifer supplying water to citizens of some six states).

The proposed executive order would therefore illegitimately intrude into the right of employees in a free society to cooperate with Congress and the press in exposing wrongdoing, and to the right of Congress and the press to investigate Government agencies.

Imagine how the first "squeal rule" would have affected investigation of Watergate or the Iran-Contra affair by Congressional committees and by newspapers such as the Washington Post and the New York Times.

Another element of the first "squeal rule" that raises serious concerns is § 8.4(a)(4), requiring a challenge in writing to all "questionable requests for access eligibility or need to know determinations." This would mean employees requesting "classifiable" information -- which could mean any document -- could be punished for it. In light of Congressional concern over unjustifiable non-disclosure agreements, such as Standard Forms 189 and 312, which would have required employees to pledge not to disclose "classifiable" information, Congress should be equally concerned that this "squeal rule" could require co-workers and supervisors of employees to turn in employees who request documents.

A second "squeal rule" imposes a new duty on supervisors of employees with security clearances to:

> continually assess the status of those employees and report to the appropriate security office any circumstances that might indicate the development of a personnel security concern, such as repeated or serious violations of security regulations, sudden and unexplained affluence, suspicious foreign travel, excessive indebtedness, sustained mental or emotional

> problems, illegal or excessive drug use, or excessive use of alcoholic beverages. [Emphasis added].

No definition of these vague terms is provided, again leaving an open door for reprisals against free speech.

The door is even left open for reprisals against Hearing Officers who grant security clearances that supervisors later determine to be questionable.

Proposed Adjudication Guidelines: There is further concern about the ways in which the proposed executive order would be abused in light of proposed regulations that were published in the Federal Register in 1987. Those regulations would make even more restrictive the personal conduct standards applicable to defense contractor employees. See e.g., 52 Federal Register 87, pp. 16864-76 (May 6, 1987). For example, the proposed new standard would add a new criteria in proposed new subsection 32 C.F.R. § 155.6(e)(17): "Acts of sexual misconduct or perversion indicative of moral turpitude, poor judgment or lack of regard for the laws of society." 52 Federal Register 87 at 16866. Even if an employee's consensual private life were monogamous and lawful in his or her state, the proposed new regulation could allow denial of a security clearance based on something as ethereal and subjective as unwritten "laws of society," which could be defined and applied by unknown and unquestioned federal employees without notice or hearing. Coupled with the denial of a hearing, cross-examination and confrontation, the more restrictive personal conduct standards proposed in the Federal Register send a signal to "whistleblowers" that they must keep their mouths shut or face revocation of their security clearances.

II. RECOMMENDATIONS FOR LEGISLATIVE REFORM OF THE CURRENT SYSTEM

Based on the analysis in this memorandum, and basic principles of Due Process and fair play, the following recommendations are necessary for a comprehensive resolution of the weaknesses in security clearance decisions, both those under the status quo and those threatened by the proposed executive order:

1. Enact permanent legislation, currently implemented by § 630 of the Defense Authorization Act, barring implementation of SF-187, which stops employees from releasing "classifiable" information that has never been classified.

2. Make revocation of security clearances a listed personnel practice under the Civil Service Reform Act, and wrongful revocation a prohibited personnel practice.

3. Protect "whistleblowers" from **any** discrimination, not just those Congress can anticipate.

4. Support the provisions of S. 436, the corporate whistleblower legislation, and amend it to assure that security clearance investigations and revocations cannot be used as reprisals against "whistleblowers" revealing misconduct. We must guarantee that employees will not be subjected to actual or threatened reprisals under color of security clearance revocations -- when the real reason is protected free speech about fraud, waste, abuse, environmental, health and safety problems. Reprisals against government and contractor employees reporting such problems are all too frequent, and threaten to chill free speech. From Hanford, Washington to Fernald, Ohio to Schenectady, New York to Rocky Flats, Colorado, loyal Americans exposing environmental devastation, threats to worker and public health and government contract fraud have been victims of efforts by government security clearance officials to reach out and crush dissent by arbitrary security clearance revocations.

5. Guarantee a right to a fair and impartial hearing before a neutral and detached administrative law judge appointed pursuant to the Administrative Procedure Act and Article II of the United States Constitution. The current system provides for a hearing only before a Hearing Examiner who is in effect supervised by the prosecutor -- significantly, the organizational chart of the Directorate for Industrial Security Clearance Review shows the Director supervising both the Hearing Examiners and the Appeal Board. "A fair trial in a fair tribunal is a basic requirement of Due Process." In re Murchison, 349 U.S. 133, 136 (1955). See also Aetna Life Insurance Co. v. Lavoie, 475 U.S. 813 (1986). The current system does not protect Due Process because decisionmakers are not free to render unbiased decisions. In

fact, the Defense Department amended Defense Directive 5220.6 in 1985, deleting the requirement that Hearing Examiners and the Chairman and at least one other member of each Appeal Board panel be "qualified civilian" attorneys, and deleting the requirement that the Assistant Secretary of Defense:

> exercise his [or her] administrative authority over the Program so as to assure that Board Members and Examiners render impartial and independent findings, judgments and determinations in security clearance cases.

Pentagon officials also removed at least one Appeal Board decision from the mail with orders to rewrite it, required the Appeal Board to report each decision to the Director of the Directorate for Industrial Security Review (DISCR), and required the Chairman of the Appeal Board to serve as an assistant to Department Counsel in writing Statements of Reasons (SORs). These overt acts evidence the Pentagon's intention that DISCR Appeal Board be a kangaroo court, not an independent administrative court. These overt acts also lead logically to our next recommendation.

7. Remove adjudication from the Defense Department due to DoD's insensitivity to Due Process and human rights, and to assure that cases are adjudicated before independent, neutral and detached judges knowledgeable about human rights and human resource issues. Having telegraphed its intentions by removing the requirement of independent determinations -- and having pressured Hearing Examiners and Appeal Board members to decide cases in favor of the military, the Pentagon does not deserve a second chance to clean up its mistakes. DISCR Hearing Examiners and Appeal Board members must no longer be bossed and bullied by the Defense Department, and should be independent adjudicators located in another agency.

8. Move adjudication of security clearances into an independent Administrative Law Judge Corps, such as that endorsed by the American Bar Association, or into an agency experienced at handling a high volume of employment and discrimination cases, such as the Department of Labor.

9. Guarantee full rights to confrontation and cross-examination; the current system, for example, does not allow a person denied a security clearance to have subpoena power. DISCR regulations codified at 32 C.F.R. § 155.5(b)(5) permit only "invitational travel orders," and DISCR decisions have held there is no right to subpoenas. Similarly, DISCR regulations permit discovery only of materials in DISCR files, not elsewhere. 32 C.F.R. § 155.7(h). Persons denied security clearances must have a right to confront the witnesses against them, to subpoena witnesses, to discover the evidence against them pursuant to the

Federal Rules of Civil Procedure, to file motions for judicial recusal for cause, and to all of the same rights, privileges and immunities generally afforded civil litigants.

10. Assure that rulemaking complies fully with the Administrative Procedure Act, to assure that factors used to deny security clearances are logical and valid, and related to concerns about spying. The APA must be specifically included in the statute, due to the Pentagon's contention that its procedures are exempt; the only security clearance decisions that Congress should consider exempting are those in a war declared by Congress pursuant to Article I of the United States Constitution.

11. Guarantee that security clearance revocation criteria respect individual rights to privacy, as guaranteed by the Ninth Amendment to the United States Constitution and as anticipated in the Declaration of Independence (the right to "life, liberty and the pursuit of happiness"). Any specific conduct found in security regulations to justify revocation of security clearances must be shown to be rationally related to the likelihood of spying or giving information to spies -- not merely to societal prejudices or fears relating to sexuality, alcohol, drugs, debts or other conventional "moral" standards in current regulations. The linchpin of finding a "security risk" must be some verifiable indicia of an increased propensity to spy or give information to spies -- not merely majoritarian prejudices or religious beliefs. For example, purely personal conduct that cannot make one susceptible to blackmail because it is openly acknowledged by the employee to his family, friends and supervisors (e.g., being gay) should not be the basis of denying security clearances. Regulations relating to the conduct of government and private sector workers that can result in revocation of security clearances should be subject to careful judicial review pursuant to the Administrative Procedure Act.

12. Restrict the power of the Executive to issue Executive Orders on the subject of security clearance grants and denials, requiring the consultation and approval of Congress -- consultation lacking in development of the proposed executive order.

13. Require hearings be open to the press and public, and that no proceeding should be held in secret (absent a strongly demonstrated showing of adverse consequence to national security which would justify a protective order for all or part of a hearing). The current procedure at DISCR presumes secrecy: "Hearings will be closed to spectators except upon mutual agreement of applicant and Department Counsel." 32 C.F.R. § 155.7(h). No transcripts should be permitted to be destroyed or sequestered. "Sunlight is the best disinfectant," as Justice Brandeis put it best. Secrecy is the watchword of the Star Chamber, not a republic.

14. Provide for appeals to be taken to an independent Security Clearance Review Board, consisting of Administrative Law Judges, with appeals from there to the Court of Appeals for the District of Columbia Circuit or the Circuit where the employee lives or works. Congress should reject any suggestion that such appeals be pigeon-holed in the United States Court of Appeals for the Federal Circuit in light of its growing reputation for hostility to free speech and civil service rights. Congress should instead trust the judgment of the Circuits where employees live and work, and the District of Columbia Circuit, which are collectively far more sensitive to human rights issues.

15. Require publication of all security clearance decisions of Administrative Law Judges and the Security Clearance Review Board, incorporating Administrative Procedure Act standards. Current DISCR decisions are not published. In fact, they are available only in an Arlington, Virginia reading room equipped with only one desk for the public. This is inadequate access to and notice of the applicable case law for employees and their lawyers, and for the public and press. An open process requires equal access to decisions for all Americans, not just those in the Washington, D.C. metropolitan area.

16. Require that the Government meet its burden of proof for revocation of a security clearance by clear and convincing evidence.

17. Require backpay for employees found to have wrongfully been denied security clearances where those employees lost income, jobs or benefits as a result of security clearance revocations.

18. Extend Due Process protections to denials of security clearances to defense facilities as well as employees. There is no principled reason to permit a Government contractor's rights to be violated by decisions without hearings and cross-examination. When a security clearance is revoked from a university or corporation, entire communities, and hundreds of workers, can be devastated.

III. CONCLUSION

In his Inaugural Address, President Bush stated:

> A new breeze is blowing.... Great nations of the world are moving toward democracy -- through the door to freedom.... The people of the world agitate for free expression and free thought -- through the door to the moral and intellectual satisfactions that only liberty allows.
>
> We know what works: Freedom works. We know what's right: Freedom is right.

The proposed executive order on security clearances is inconsistent with that "new breeze." It threatens freedom. It will not work.

The proposed executive order would only serve to penalize "free expression and free thought" while denying the "moral and intellectual satisfactions that only liberty allows." Id.

Rather than moving through the "door to freedom," the proposed executive order would move backward to the McCarthy 1950's, when a person's unseen accusers could ruin their career, sending lives careening into the abyss of unemployment and disgrace simply because of associations with unpopular causes or persons.

Denial of a security clearance without Due Process -- including cross-examination, confrontation, and open hearings -- is in effect, a form of "blacklisting" as sinister as anything that was permitted to occur in this country during the McCarthy era and the period before the National Labor Relations Act (NLRA).

We do not "guess" people into the penitentiary in this country. We do not permit employers to use pretexts to discharge union organizers under the NLRA. We do not permit the government to use pretexts to discharge "whistleblowers" who are federal employees, or permit defense contractors to use pretexts to discharge employees reporting fraud under the False Claims Act.

Neither should we permit the national security bureaucracy, in secrecy, to "guess" that someone is a security risk, and to "guess" them out of their job, career, home and happiness. We must assure Due Process of law. Yet the proposed executive order would deny both substantive and procedural Due Process, and would actually permit by the "backdoor" of secrecy a mushrooming number of outrageous employee discharges that would be forbidden under the National Labor Relations Act, the False Claims Act, and public and private sector "whistleblower" legislation.

Mr. Sikorski. Thank you.

Let me just say that I want the record to be clear. Ms. Lawton appeared here at the subcommittee request, and we are quite grateful for her testimony and assistance in this matter. She is one of the career civil servants that the subcommittee has been proud to stand by. She is talented and hardworking. And she is not personally responsible for the actions of this group.

This group ended its work some time ago. And she has faithfully and diligently served at Justice for many years. In fact, since Eisenhower and under every President since.

In chairing the task force, she had a very tough job, an unenviable job, a job that I would not take. I want to thank her again for her testimony and the forthcoming written responses to help clarify, especially the due process issues that we are talking about.

It should be clear, people should understand that her position here is not as a representative of the Executive Office on the proposal, because that proposal is in draft form. It is over there and they will provide their defense and support or rationale for it as it comes along.

I did want the people to understand that we are very, very grateful for her testimony and her assistance on this. And we thank her for her hard work.

Mr. Garfinkel is also thanked for taking the time to be here at this hearing this morning. Since it kind of gets deposited on him if the order is signed, his role is less active.

We look forward to maintaining and continuing the working relationship we have had.

Let me say, Mr. Devine, that we really thank you for your assistance in pointing out these issues, and calling people's attention to the memorandum of analysis of what is wrong with the proposed Executive order; which states, I think, in five parts, issues of concern stretching from denial of statement of reasons, hearings, cross examination and confrontation, through vague, overinclusive, overbroad nonstandards, and potential threat to freedom of association and the potential threat to the right to travel and squeal rules, and the proposed adjudication guidelines, as well as recommendations for legislative reform of the current system, some 18 as I recall.

Mr. Adler is the legislative counsel for the ACLU, and I take it you are a card-carrying member of the ACLU?

STATEMENT OF ALLAN ADLER, LEGISLATIVE COUNSEL, AMERICAN CIVIL LIBERTIES UNION

Mr. Adler. Actually, I am not a member; I am their attorney. [Laughter.]

Mr. Sikorski. Are you running for some office later on? Is that it?

Mr. Adler. No.

Mr. Sikorski. You have spent a great part of your career on the security clearance and access issues. And the subcommittee thanks you for providing your views on this matter. And we ask you to summarize your comments you have provided to us with 19 pages of testimony and attachments, including the questionnaire for sensitive positions.

What is the second attachment?

Mr. ADLER. The second one was a September 1988 memorandum from OPM, which indicated that they were considering a proposal for a "Security Source Locator" project, which would have primarily consisted of the compilation of a directory of organizations which are "questionable and/or under investigation by Federal law enforcement agencies."

The purpose of that would be to develop a source of specific files to use when they do background investigations on certain individuals.

I put that in the testimony because the characteristic of the organizations that would be listed sounded very strangely like the kind of "Subversive Organizations" list that Attorney General William Saxbe abolished in 1974. It said basically that the directory will contain "questionable organizations such as terrorist groups, radical groups, religious cults, and anti-income tax groups."

These groups "may or may not be under investigation."

Mr. SIKORSKI. That is about 120 million groups.

Mr. ADLER. I believe so. So I thought that was important for the committee to consider, in terms of understanding the context in which the concerns about the draft executive order have arisen.

Mr. SIKORSKI. OK.

Why don't you please make your points?

Mr. ADLER. Thank you.

The draft executive order, Mr. Chairman, has placed the ACLU in somewhat of an ironic position. In any other time, without the draft executive order before us, a hearing on the Federal personnel security program would have had the ACLU testify to the need for improvements in the procedural due process rights presently afforded to individuals.

Frankly, we have received a number of inquiries over the years from individuals. If they are DOD military or civilian employees, they tend to complain that the disparities between the procedural due process rights afforded to them and those afforded to Government contractor employees deny them equal protection of the law.

More often the complaints, whether the individuals are Government or contractor employees, criticize existing procedures as not affording them adequate due process because they are typically not given complete statements of the reasons for the denial or revocation of a clearance.

Quite typically, information is witheld on national security grounds, or because the Government believes that it is necessary to protect confidential sources who have provided information that may or may not have served as the basis for a determination to deny or revoke a clearance.

In addition, these individuals are surprised and frustrated to find out that, in most cases, they have no recourse to judicial review of such determinations. It is worth noting for the record that the Reagan administration had been waging a steady fight to see that, first, individuals would not have recourse to the Merits Systems Protection Board when the denial or revocation of a clearance also cost them their positions of employment.

And second, that the administration continually criticized the 1972 U.S. Court of Appeals decision, *Hoska* v. *Department of the*

Army, on the grounds that they believe there is absolutely no appropriate role for judicial review of security clearance determinations.

However, since we do have the draft executive order before us, I am not here today to criticize the existing system, but again, ironically, to preserve and defend that system in the face of what this draft order would do to it.

Let me just briefly touch on three points that were made by the previous panel before I summarize some of the other points in the testimony, because I think it would help clarify the discussion that has gone before and that which will follow.

Ms. Lawton had suggested that one of the objectives of this endeavor was to try to distinguish between access and employment considerations. And in distinguishing access, she also attempted to distinguish between decisions about whether or not a particular individual has a need to know certain classified information, from the decision which then follows, assuming that there is a need to know, as to whether or not the particular individual should be considered eligible for access to that information.

Unfortunately, the position that the administration has taken regarding the lack of any real impact that a security clearance denial or revocation has on an individual's reputation or employability, simply does not square with the realities of the world, as millions of Americans know it.

If you look at the situation in terms of the Government's process for determining an individual's suitability for employment, as well as this separate regime for determining whether an individual should be considered eligible for access to classified information, the fact of the matter is that what the Government seeks to find out in order to make its determination is whether or not the individual has certain characteristics or traits or has engaged in certain activities, conduct or behavior which would lead the administration to conclude that, either because of deficiencies in the person's character or deficiencies in the person's judgment, the individual is either, in the case of suitability, not fit to hold Government employment in a particular position or, in the case of security clearances for access to classified information, not fit to be trusted with the high responsibility of safeguarding national security secrets.

Unfortunately, the derogatory nature of this of information is well known to be the basis for these determinations. One only has to examine the current DOD directives that govern the existing program, as well as look at the draft Executive order itself, to see the kinds of factors that are considered in making the determination.

When you talk about things like, whether or not an individual has "exploitable vulnerabilities," or has engaged in "exploitable conduct" or "indiscreet behavior," more specifically, whether or not an individual has engaged in criminal or dishonest activity, alcohol or substance abuse, or "exploitable sexual conduct," it is not surprising that most people would assume, whether correctly or not, that when an individual has had a clearance denied or revoked, it is based upon at least one of these factors.

That naturally tends to cast some doubt on that person's character, judgment and general fitness to hold a responsible position.

So, to argue on a legal basis in terms of past court decisions, that there is no stigma that attaches to an individual due to the denial or revocation of a security clearance, simply ignores the realities of human nature and the marketplace.

I think it is also important to add that, as a practical reality, these determinations are recorded not only in indices within the Defense Department in the case of military and civilian employees, but in files of individuals which can later be referred to by other agencies to which that agency might file a request for employment.

This stigma that attaches to a denial or revocation will follow that individual throughout that person's working career, so long as that individual attempts to pursue the field of work that required the clearance in the first place.

I would also add that in terms of the question of "need to know" versus "access," frankly, we do not have an argument with the Government's position that need to know is a separate determination. In fact, we believe that it is wholly appropriate, and we would hope that the Government would continue to determine, that more and more people do not have a need to know classified information.

Perhaps that would be a way in which over-classification practices of the Government and the far too many clearances that are granted would be reduced.

If people did not need national security information in order to perform jobs which have only an attenuated relationship to true national defense, foreign relations or intelligence activities, then they would have no need to know, and no need to go through the clearance process to risk this kind of stigma attaching to their reputation and employability.

The final point I would make in connection with the discussion that preceded this panel is that, with respect to the Privacy Act, I think it is well known to most individuals who have had any familiarity with the way in which that act works in practice, that most individuals who apply for their records to try to find out the basis for a security clearance denial or revocation will be denied a substantial amount of information on the grounds that the information has been classified, and will be denied a substantial amount of information even if it is unclassified on the grounds that it would disclose the identity of a confidential source who had cooperated with the background investigation.

Also, as a practical matter, the subcommittee should note that one pursuing a Privacy Act request to try to correct inaccurate records that serve as the basis for this kind of decision, or any other action taken by the Government, has quite a hard road to hoe.

In fact, most agencies will not be willing to admit that the information in their files is wrong. Even if they do concede that there is a question about the accuracy of the information, at best, most agencies will be willing to let the individual put an additional piece of paper into the file that simply expresses his view or his side of the story.

As a practical matter, if the agency denies the right to correct information or denies access to the information, the only recourse that the individual has is to sue the agency in Privacy Act litigation. That litigation may take as many as 2 or 3 years to run its course. And in the end, the vast majority of plaintiffs in such cases find that the remedy for which they brought the case is not forthcoming.

I think the chairman has already expressed, quite adequately in my view, what the problems are with respect to the draft Executive order's approach to procedural due process. The combined effect of the provisions the chairman mentioned, in our view, is simply the uniform elimination of procedural due process rights in all denial cases, and substantial curtailment of rights now afforded to contractor employees in revocation cases as well.

As the chairman pointed out, in the numerous studies that have occurred, both in Congress and the Defense Department in the 5 years during which the inter-departmental group was drafting this Executive order, there have been many comments made about the need to improve the federal personnel security program.

In fact, there is a general consensus within all these studies that the real problem is a combination of vague adjudicatory criteria, inadequately trained adjudicators, and a lack of centralization in the process which tends to produces inconsistent and uneven adjudication results.

But, as the chairman mentioned, not one of these studies offered any indication of security or other problems which would justify any curtailment of the existing procedural due process rights that are afforded to individuals in denial or revocation cases.

Let me indicate something else which is disturbing to us about the way in which the draft executive order approaches procedural due process. This document, which I would be happy to make available to the subcommittee, is dated January 12th, 1989, and is from the Directorate for Industrial Security Clearance Review. The subject of is——

Mr. SIKORSKI. Does that have a classification?

Mr. ADLER. Excuse me. No, it is not classified. It has no marking on it, anyway. [Laughter.]

The subject of this document is the Directorate's productivity. Because of a Presidential directive that encouraged a 20 percent productivity improvement in the various Federal agencies by 1992, as well as a concern that was expressed in hearings back in 1985 before a Senate subcommittee regarding the backlog that had arisen in the Federal Personnel Security Clearance Program, the document urges a strong need to increase the Review Office's productivity dramatically.

What is particularly disturbing, in terms of the memo's congratulations to the Directorate on its improvement in productivity, is that it indicates, and I quote, "The most dramatic increase each year," and they are now talking about productivity since 1984, "has been the total number of denials of security clearance, from the low of 130 that was a source of concern in 1983, to the present high of 949 in 1988."

While there is no doubt that the security system is so bloated with clearances which are not needed that it can easily withstand, without any harm to national security, massive reductions in the number of people who have clearances, there is something quite disturbing about taking a statistical approach to this problem, which assumes simply that the denial of clearances or the revocation of clearances for the purpose of producing those statistics is a good end in itself.

What happens to the due process rights of individuals who are the subject of those clearance denials and revocations, I think, is not adequately addressed in the concerns of either the review or the draft executive order.

Let me just indicate briefly a few of the other issues that we have mentioned, which we believe should be reviewed by Congress in the appropriate committees and public hearings before this draft Executive order proceeds toward final implementation.

For one thing, we note that, although the draft Executive order purports to have as its chief purpose the creation of a uniform Federal personnel security program to replace the various programs that presently exist, the draft Executive order would exclude from these uniform standards special access programs which are created pursuant to the Executive Order 12356 on safeguarding national security information.

We think that this is somewhat ironic, especially since just a year ago, concerns about the proliferation of unnecessary and unaccountable special access programs in the Defense Department led Congress to enact a formalized reporting requirement and oversight process for such programs as part of the National Defense Authorization Act for fiscal years 1988 and 1989.

In light of this concern about the proliferation of special access programs, we question why or whether such programs should be exempted from the effort to develop a uniform overall Federal personnel security clearance program.

Second, we raise the issue with respect to a provision in the draft Executive order noting that individuals who are to be considered for eligibility for access shall complete and submit a personal history statement and consent forms as the basis for a background character investigation.

Now the ACLU raises no objection per se to the requirement of a personal history statement and consent form. However, as the contents of such statements and forms may relate to an individual's first amendment rights and protected personal privacy interests, we believe it is an appropriate subject of Congressional inquiry to determine what will be the required contents of such forms.

The proposed Executive order does not indicate what either the personal history statement or the consent form would specifically require from the individual. But that is the reason why, Mr. Chairman, we appended to our testimony the two forms which you have mentioned, OPM standard form 86, and OPM's memorandum concerning the proposed security source locator project.

Again, if this is the environment in which the draft Executive order proposes to take its place, we are very concerned that the personal history statements and consent forms required under this order would infringe upon an individual's first amendment rights and protected privacy interests.

Mr. SIKORSKI. Perhaps you could summarize; we have a time problem.

Mr. ADLER. Sure.

Our statement sets forth other areas of the draft Executive order which we think are appropriate for Congress to examine. The chairman has touched upon them, and we would be happy to answer any questions or provide any information that the subcommittee may need.

[The prepared statement of Mr. Adler follows. The questionnaire he referred to was retained in the hearing file.]

STATEMENT OF
ALLAN ROBERT ADLER
LEGISLATIVE COUNSEL
AMERICAN CIVIL LIBERTIES UNION

Mr. Chairman and Members of the Subcommittee:

On behalf of the American Civil Liberties Union (ACLU), I want to thank you for inviting me here today to discuss the proposed Executive Order Governing Access to Classified Information, which the Office of Management and Budget recently circulated for final agency comments at the request of the National Security Council.

As you may know, the ACLU is a nonpartisan organization of over 250,000 members dedicated to the promotion and defense of civil liberties protected by the Bill of Rights. Over the years, the ACLU has maintained a close watch over the various federal security clearance programs in response to complaints indicating that the rights of individuals are inadequately protected during the investigation and adjudication processes through which a determination of eligibility for access to classified information is made.

The proposed Executive Order, which the ACLU obtained and made available to the press early last month, would revoke President Eisenhower's 1960 Executive Order 10865 on "Safeguarding Classified Information Within Industry" and would establish a "uniform federal personnel security program" applicable to all U.S. Government employees, contractors, licensees, grantees, military personnel, and "other individuals (including applicants for Government positions) with a determined need for access" to national security information.

For reasons discussed further on in this statement, the ACLU believes that a number of provisions in the proposed Executive Order should be carefully reviewed by appropriate committees of Congress before a final version of the Executive Order is issued.

But there is one aspect of the proposed Executive Order which is most troubling to the ACLU and requires the immediate intervention of Congress to make sure that the President will not issue the Executive Order in its current form: this is its scheme to strip the personnel security clearance process of the basic procedural fairness which, for nearly thirty years, has afforded most individuals the right to a statement of reasons and a meaningful opportunity to appeal in security clearance denial and revocation cases.

PROCEDURAL DUE PROCESS IN CLEARANCE DENIAL AND REVOCATION CASES

Thirty years ago, the Supreme Court voiced grave skepticism about the constitutionality of "an industrial security clearance program under which affected persons may lose their jobs and may be restrained in following their chosen professions on the basis of fact determinations concerning their fitness for clearance made in proceedings in which they are denied the traditional procedural safeguards of confrontation and cross-examination." Greene v. McElroy, 360 U.S. 474, 493 (1959).

Although the Court in Greene did not determine whether "the traditional safeguards of due process" were constitutionally mandated in such cases, the Court's concern that the revocation of Mr. Greene's clearance "failed to comport with our traditional ideas of fair procedure," 360 U.S. at 508, led President Eisenhower to provide government contractor employees with a basic complement of those "traditional safeguards" pursuant to an Executive Order.

The preamble to Executive Order 10865, "Safeguarding Classified Information Within Industry," 25 Fed.Reg. 1583, February 20, 1960, is instructive concerning the intent of the program as a whole. In twin "findings" regarding the provisions and procedures prescribed by the order, President Eisenhower gave equal weight to stating that they "are necessary to assure the preservation of the integrity of classified defense information and to protect the national interest," and that they "recognize the interests of individuals affected thereby and provide maximum possible safeguards to protect such interest."

Executive Order 10865 specifically established these "safeguards" through the general requirement that "an authorization for access to a specific classification category may not be finally denied or revoked... unless the applicant has been given the following:"

> (1) A written statement of the reasons why his access authorization may be denied or revoked, which shall be as comprehensive and detailed as the national security permits.

(2) A reasonable opportunity to reply in writing under oath or affirmation to the statement of reasons.

(3) After he has filed under oath or affirmation a written reply to the statement of reasons, the form and sufficiency of which may be prescribed by regulations issued by the head of the department concerned, an opportunity to appear personally before the head of the department concerned or his designee, including, but not limited to, those officials named in section 8 of this order, for the purpose of supporting his eligibility for access authorization and to present evidence on his behalf.

(4) A reasonable time to prepare for that appearance.

(5) An opportunity to be represented by counsel.

(6) An opportunity to cross-examine persons either orally or through written interrogatories in accordance with section 4 on matters not relating to the characterization in the statement of reasons of any organization or individual other than the applicant.

(7) A written notice of the final decision in his case which, if adverse, shall specify whether the head of the department or his designee, including, but not limited to, those officials named in section 8 of this order, found for or against him with respect to each allegation in the statement of reasons.

For nearly thirty years, Executive Order 10865 has governed the Defense Industrial Security Program through which the Defense Department and eighteen other federal agencies and departments processes security clearance eligibility requests for government contractor employees.

The Defense Industrial Security Program is implemented pursuant to the Department of Defense Personnel Security Program Regulation, DOD Directive 5220.2-R, January 1, 1987, 32 C.F.R. Part 154 (1987), which generally prescribes policy and procedures governing access to classified information by DOD military and civilian employees, except that the procedures to be afforded to contractor employees in clearance denial and revocations cases are contained in the Defense Industrial Personnel Security Clearance Review Program, DOD Directive 5220.6, August 12, 1985, 32 C.F.R. Part 155 (1985), proposed revision, 52 Fed.Reg. 16864 (May 6, 1987).

The distinction in procedural due process afforded to government contractor employees, on the one hand, and DOD military and civilian employees, on the other, stems from the fact that Executive Order 10865 does not specifically apply to DOD military and civilian employees. However, the governing DOD Directive 5200.2-R, at Section 154.56, similarly provides that "[n]o final personnel security determination shall be made" regarding such individuals without granting them "procedural benefits" which are like those required for contractor employees except that the mandated "opportunity to appeal to a higher level of authority" is not described as a hearing or an "opportunity to appear personally," and is not accompanied by any right to be represented by counsel or to cross-examine adverse witnesses.

Other federal agencies, such as the Department of State and the Department of Energy, have their own security clearance adjudication programs for access to classified information, as do intelligence agencies such as the CIA and the National Security Agency because of their reliance on "special access programs." But the overwhelming majority of determinations of eligibility for access to classified information are processed under the two directives discussed above.

From time to time, individuals whose eligibility for access to classified information has been denied or revoked call the ACLU to inquire about their rights. If they are DOD military or civilian employees, they sometimes complain that disparities between their procedural due process rights and those afforded to government contractor employees denies them equal protection of the law. More often, however, the callers -- whether government or contractor employees -- criticize the existing procedures as not affording them adequate due process because they have not been given complete statements of the reasons for their denial or revocation. In addition, they are surprised and frustrated to hear that, in most cases, they have no recourse to judicial review of these determinations.

The ACLU believes that government employees and contractor employees alike would be appalled at the draft Executive Order's approach to procedural due process rights.

As we read Sections 7.2 and 7.3 of the proposed Executive Order, the combined effect of these provisions is the uniform elimination of procedural due process rights in _all_ denial cases and the substantial curtailment of rights now afforded to contractor employees in revocation cases as well.

Although Section 7.2 requires that a written explanation, an opportunity to reply, and an opportunity to appeal to a higher authority "shall be provided" to individuals "who are determined not to meet the standards established in this Order for access to national security information," its language explicitly excludes "candidates for initial access or for access at a higher level" from this requirement. This means that the provision makes the stated procedures available in cases of clearance _revocations_ but not in cases of clearance _denials_.

For a contractor employee whose clearance has been _revoked_, this represents an additional cut-back from the opportunity afforded under Executive Order 10865 to present evidence at a hearing or, at least, in a personal appearance before the head of the agency concerned, together with representation by counsel and cross-examination of adverse witnesses.

Section 7.3(a) states that agency heads "may provide for additional review proceedings such as hearings, opportunities to confront persons making statements adverse to the individual, and appearance by legal counsel..." However, the additional proceedings may be obtained from agency heads only "at their sole discretion and as resources and national security considerations permit." Moreover, they are available only to individuals who qualify for the procedures provided under Section 7.2 (i.e., revocation cases).

Even the requirement to provide the limited procedures under Section 7.2 "may be waived" under Section 7.3(b), where the agency head or a designated senior official makes a written determination that providing such procedures "would not be consistent with the national security interests of the United States."

Although Executive Order 10865 also permits the head of a department to conclusively waive the provision of the prescribed procedural due process rights, Section 9, the authority in that context has plainly been viewed as a limited exception to a general rule of affording such rights. Under the proposed Executive Order, however, the presumption appears to have been reversed and affording individuals due process procedures has become the "discretionary" exception rather than the general rule.

During the five years in which the interdepartmental group created under National Security Decision Directive - 84 was laboring to produce the draft Executive Order, several Defense Department and Congressional reports were issued concerning the process by which determinations of eligibility for access to classified information are made under the existing federal personnel security programs. See departmental studies by the DOD Industrial Security Review

Committee (the 1984 "Harper Report") and the DOD Security Review Commission (the 1985 "Stilwell Report") and Congressional studies by the Senate Governmental Affairs Permanent Subcommittee on Investigations ("Federal Government's Security Clearance Programs," S.Rpt. 99-230, January 1986); the Senate Select Committee on Intelligence ("Meeting the Espionage Challenge: A Review of U.S. Counterintelligence and Security Programs," S.Rpt. 99-522, October 1986); and, the House Permanent Select Committee on Intelligence ("U.S. Counterintelligence and Security Concerns: A Status Report - Personnel and Information Security," H.Rpt. 100-1094, October 1988).

Although each of these studies concluded that a combination of vague adjudicatory criteria, inadequately-trained adjudicators and a lack of centralization tended to produce inconsistent and uneven adjudication results in clearance cases, not one of them offered any indication of problems which would justify any curtailment of the existing procedural due process rights that are afforded to individuals whose eligibility for access to classified information has been denied or revoked.

Moreover, during comprehensive hearings on the "Federal Government Security Clearance Programs," witnesses from the Department of Energy, the Department of the Air Force, the Department of the Army and the Department of the Navy each discussed their agency's implementation of procedural due process rights without offering any complaint in terms of security or administrative burden. Hearings before Permanent Subcommittee on Investigations of the Senate Committee on Governmental Affairs, 99th Cong., 1st Sess., pp. 338, 901, 948 and 962 (1985).

No one has a right to a security clearance for access to classified information. But surely any individual should be afforded a meaningful opportunity to respond to allegations that cast doubt on his/her character, judgement and fitness to be entrusted with important responsibilities in government service. This principle of fundamental fairness was acknowledged by President Eisenhower nearly thirty years ago; we are vividly reminded of it today amidst the rueful and angry Senate debates over the Tower nomination. Before it is forgotten once again, it should be restored and preserved for the millions of people who are subject to investigation and adjudication in the federal personnel security program.

Mr. Chairman, the proposed Executive Order contains several other provisions which merit Congressional scrutiny in public hearings before they are approved for implementation. By order of the sections in which they appear, these include:

Special Access Programs - Section 1.2(c): Although the proposed Executive Order purports to establish "a uniform federal personnel security program concerning those individuals who will be considered for access to national security information," this provision states that access to national security information relating to any "special access program" established under Executive Order 12356, "National Security Information," 47 Fed.Reg. 14874, April 1, 1982, "may be granted in accordance with procedures established by the agency heads who created the program."

Just over a year ago, concerns about the proliferation of unnecessary and unaccountable "special access programs" in the Department of Defense led to the enactment of a formalized reporting requirement and oversight process for such programs as part of the National Defense Authorization Act for Fiscal Years 1988 and 1989. See P.L. 100-180, Title XI, Part D, Section 1133, codified at 10 U.S.C. Section 119.

In light of the relationship between overclassification and the problems which plague the security clearance programs, it is not clear why or whether such programs should be exempted from the effort to develop "uniform" standards.

Personal History Statement & Consent Forms - Section 3.1(a):

The requirement that all individuals who are to be considered for eligibility for access to national security information shall complete and submit a personal history statement and consent forms as the basis for a background and character investigation is not objectionable *per se*; however, the prescribed content of such statements and forms, as it may relate to an individual's First Amendment rights and protected personal privacy interests, is a matter of concern to the ACLU and an appropriate subject for Congressional inquiry.

The proposed Executive Order does not indicate what either the personal history statement or the consent forms would specifically require of the individual. Congress should note, however, that OPM's Standard Form 86, "Questionnaire for Sensitive Positions," revised October 1987, still makes inquiries into an applicant's "Association Record" that may violate the individual's rights under the First Amendment and the Privacy Act. (See attached copy of Standard Form 86)

Moreover, according to a September 1988 memorandum from OPM's Office of Federal Investigations, OPM was considering a proposed "Security Source Locator Project" involving the compilation of a directory of "questionable organizations such as terrorist groups, radical groups, religious cults, and anti-income tax groups... [which] may or may not be under investigation" by Federal law enforcement agencies, for use by its Background Processing Branch, Federal Investigations Processing Center. (See attached copy of OPM memorandum)

Minimum Investigative Standards - Section 3.1(b) & (c): The evident purpose of these provisions is to establish the requisite investigative standards for determining clearance eligibility, with some differentiation depending upon the level of access that is at issue.

For "Confidential" or "Secret" information access, in addition to the minimum requirements, Section 3.1(b) states that "an agency shall use other lawful investigative procedures, such as a subject interview and inquiries of neighbors, coworkers, or other persons who are familiar with the individual, when use of such procedures is deemed to be productive and advisable in the interests of national security."

However, in the case of "Top Secret" clearance under Section 3.1(c), the standard "includes all the investigative procedures described in subsection (b) above" and, in addition, generally instructs agencies to "use any other lawful investigative procedure when use of such procedure is advisable in the interests of national security." What are the unspecified "other lawful investigative procedures" and why do they not have to be deemed "productive" as well as "advisable", as in subsection (b)?

Reinvestigation Standard - Section 4.1(b): This provision states that individuals who are eligible for access to national security information "may be the subject of reinvestigation any time there is reason to believe that they may no longer meet the standards for access" under the Executive Order.

The ACLU does not object to a clear and specific periodic reinvestigation requirement, especially when the standard is for cause. However, the standard under the proposed Executive Order is too vague to safeguard against abusive reinvestigation based upon wholly unfounded allegations. Moreover, it is needlessly vague, since the factors that provide cause for reinvestigation can be articulated in the same way they appear in Section 8.4(b), where they inform the supervisor's individual responsibility to "continually assess the status" of cleared employees and to report to the appropriate security office "any circumstances that might indicate the development of a personnel security concern . . ."

Factors Considered in Adjudication - Section 6.1: The adequacy of adjudication criteria is an essential concern from the national security perspective, as has been amply demonstrated by the findings and recommendations in the cited DOD and Congressional studies calling for improvements in existing criteria. However, the precision with which adjudication criteria are articulated and applied is also a critical concern from the perspective of individual rights, especially in the context of a proposed Executive Order that does not acknowledge the importance of "fairness" as a basic consideration in the security clearance process.

It is important to note here, as in the discussion of due process procedures, that the proposed Executive Order repeatedly emphasizes the "wholly discretionary" nature of the determination of eligibility for access to classified information. See Preamble; Section 2.1(b); Section 6.1(a).

In contrast, the Defense Department regulations which currently govern access to classified information by DOD military civilian and contractor personnel repeatedly emphasize that each adjudication is "an overall common sense determination based upon consideration and assessment of all available information." See DOD 5200.2-R, Supra, Sections 154.7 and Appendix H.

While it is clear from both characterizations that clearance determinations involve highly subjective judgments, the language in the proposed Executive Order conveys a disturbing vagueness and unaccountability which are reflected in the awkward formulations of the "factors to be considered" in determining whether access to classified information should be granted or continued under Section 6.1(b) and (c). For example, it would seem that an individual who "has engaged in criminal or dishonest activity, alcohol or substance abuse, or exploitable sexual conduct" under (6)(3) clearly "has exploitable vulnerabilities or has engaged in ... exploitable conduct or indiscreet behavior" under (b)(1). What other vulnerabilities, conduct or behavior are contemplated under (b)(1)?

Similarly, what "ties of affection" or "close and continuing contacts" by persons or groups under Section 6.1(c) would justify considering their "activities" relevant to a determination of the individual's "susceptibility to influence, coercion, or duress?"

The proposed Executive Order does not indicate whether these skeletal criteria will be fleshed out with greater detail and illustration, as has been attempted in the current DOD regulations. See DOD 5200.2-R, "DOD Personnel Security Program," supra. If the policy changes regarding due process procedures in denial and revocation cases are any guide, the prospects for more clearly articulated adjudication criteria are uncertain at best. But, assuming that further specification can be anticipated in the implementing directives which are to be developed by the Information Security Oversight Office (ISOO) under Section 8.2(a) of the proposed Executive Order, it is both necessary and appropriate that Congress should examine the adequacy and propriety of proposed adjudication criteria, especially where controversial issues such as homosexuality, and foreign or political associations are to be addressed.

Implementation and Review By ISOO - Section 8: While the proposed Executive Order states that the National Security Council will "review and provide overall policy direction" for the federal personnel security program, Section 8.1(a), responsibility for "implementing and monitoring" the program is passed through the Administration of General Services to the Director of the Information Security Oversight Office (ISOO). Section 8.1(b).

The ACLU takes no position on the wisdom or propriety of this scheme, but believes that Congress should examine the proposed arrangement in terms of (1) ISOO's record in performing its existing responsibilities to implement and oversee the program for classifying, declassifying and safeguarding national security information under Executive Order 12356; (2) previous and anticipated problems in connection with implementation and oversight of the federal personnel security program; and, (3) the ability of ISOO (or any other agency) to handle the combined responsibilities of both programs.

In addition, Congress should consider whether any oversight agency can "ensure compliance" with the authorities that govern the federal personnel security program, Section 8.2(b), when it is prohibited from "consider[ing] and tak[ing] action on specific agency determinations concerning the eligibility of individuals for access to national security information." Section 8.2(g)

Individual Responsibilities (Contacts) - Section 8.4(a)(1)

This provision requires individuals who are granted eligibility for access to national security information to "report to appropriate security officials all contacts with any persons who appear to be interested in obtaining, or who are attempting to obtain, unauthorized access to classified information."

In its broad sweep, this reporting requirement could be read to embrace even the routine inquiries of journalist in pursuit of new stories involving intelligence activities, or significant developments in national defense or on foreign relations. It would be a rare event of this kind which did not, to some significant degree, have the details of it occurrence and implications cloaked in national security restrictions. Yet, it would be even more rare for a day to pass without a major news story citing classified information in the reporting of its facts.

Similar requirements were the subject of National Security Decision Directive - 197, "Reporting Hostile Contacts and Security Awareness," issued by President Reagan in November 1985, as well as recommendations of the DOD Security Review Commission in its report, "Keeping The Nation's Secrets," which was published in the same month.

In both instances, however, the primary concern was "hostile" contacts with Foreign nationals, and the proposed reporting requirements were accordingly more narrow and specific.

Congress should inquire whether the broad requirement of Section 8.4(a)(1) is intended to encompass contacts with the press. If this is the intent, Congress should carefully weigh the "chilling effect: that such a requirement could have on Fundamental First Amendment newsgathering activities, as well as on legitimate "whistleblowing" activities of government and contractor employees.

DOE and CIA Exemptions - Section 9.1(c) & (f):

Two "provisos" within this section exempt the Department of Energy and the CIA from the basic requirements of the proposed Executive Order. Section 9.1(c) and (f), respectively. As noted above with respect to "special access programs," it is not clear why or whether such exceptions would be justified under the "uniform" federal personnel security program established by the proposed Executive Order.

United States
Office of
Personnel Management

[redacted]

Washington, D.C. 20415

In Reply Refer To

Your Reference

SEP 19 [illegible]

Mr. Paul Vayo, Personnel
Staffing Specialist
Immigration and Naturalization Service
Room 6032
425 I Street, N.W.
Washington, D.C. 20536

Dear Mr. Vayo:

Enclosed is a copy of the Security Source Locator (SSL) project proposal which you briefly discussed by telephone with Linette Newsome, Program Analyst of my staff on September 13, 1988.

Please take the time to look it over, and if you should have any questions that cannot wait until a meeting is scheduled, you may contact Ms. Newsome at 632-6152.

Ms. Newsome will be contacting you in approximately one week to set up a convenient appointment with you, and whomever else you may want present.

Sincerely,

Linette A. Newsome
for [illegible]. Peter Garcia, Assistant Director
Office of Federal Investigations

SECURITY SOURCE LOCATOR PROJECT

The objective of the Security Source Locator Project is twofold:

1) To compile a directory of organizations that are questionable and/or under investigation by Federal Law Enforcement agencies; 2) develop source of specific files maintained by Federal Law Enforcement agencies, which are the results of special investigations relating to the agency's mission, and can be checked for the most sensitive cases.

I. ORGANIZATIONS SOURCE POINTER DIRECTORY

- DIRECTORY STRUCTURE

  ° The directory will contain questionable organizations such as terrorist groups, radical groups, religious cults, and anti-income tax groups. These groups may or may not be under investigation.

  ° There will be two directories. The master directory will be established and maintained at OPM's Background Processing Branch, Federal Investigations Processing Center (BPB, FIPC). It will list the organization by name, give the acronym, AKA's or subgroups, location of organization's activities, name of key leaders when possible, name of agency maintaining record information, and the agency contact's name, office, address and telephone number.

  ° The other directory will be used in OPM regions by the Federal Investigation Divisions (FID's). This directory will only contain the organization name, acronym, AKA's or subgroups, location of organization's activities, and the name of the agency where the record information is maintained.

- Purpose for the Directory.

  ° During the pre-review process, BPB, FIPC will schedule record searches with the appropriate agency when there is a match of an organization shown on the QSP (specifically to questions 13a, 13b, and 30a-f) with master directory. Scheduling of the record search will be done by sending an OFI-40 inquiry to the participating agency. When the record is too extensive or derogatory, the agency may request that the FID come to review the information in person.

  ° When an organization is developed during the course of an investigation, and matched with one in the directory, the FID's will notif BPB, FIPC, who will in turn schedule the record search via an OFI-4 inquiry to the particular agency.

  ° Any organization not shown in the directory, and characterized as questionable, will be scheduled by BPB, FIPC, via an OFI-40 inquiry to the appropriate agency.

  ° Agency Impact: Minimal

  Furnish listing of organizations and updates for directory. Listin should include name of organization, AKA's, subgroups, names of key leaders when possible, location of organization activities, and bri summary of organization's purpose.

II. EXPANDED FILES SEARCH

- A number of Federal Law Enforcement Agencies maintain special files that are not checked during the NAC process of background investigations. These files are results of special investigations performed by the agency in accordance with the agency mission, such as FBI - Domestic Security, Terrorism; IRS - Tax avoidance; DEA - Drug Intelligence; USPS Inspections - Mail Fraud, etc. OPM would like to check these files when processing Special Code Cases.

  ° Approximately 2000 Special Code cases are scheduled each year and involve the most sensitive positions. They include:

    - Congressional Staff
    - Astronauts
    - White House Staff
    - Fellow Programs
    - OPM Investigators
    - SES/GM-15 (or equivalent)
    - Special/Confidential Assistants (GS/GM -13 and above)
    - SBI
    - and in cases where the investigator develops issues in the field

  ° FIPC would send OFI-40 Inquiry or Electronic tape to participating agency with four basic identifiers (name, sex, date of birth, and SS#). The agency will then send the OFI-40 with record information or attached report back to FIPC. When files are extensive or derogatory, the agency can request to have FID come in person for review.

- Agency Impact:

Search approximately 2000 names per year or an average of 167 per month.

Mr. SIKORSKI. Again, thank you for your assistance in highlighting some of the problems of this Executive order, this proposed Executive order.

As I understand your major points, Mr. Devine, even before President Eisenhower issued that Executive Order 10865 in 1960, Government and contract employees had the right to know why their security clearance was not granted. They were entitled to a statement of reasons.

Is that correct?

Mr. DEVINE. That is correct, sir.

Mr. SIKORSKI. If this proposal is signed by President Bush, it would mean a significant step back in legal history and in precedent?

Mr. DEVINE. Yes, sir. It will return to the at-will doctrine.

Mr. SIKORSKI. The "at-will" doctrine?

Mr. DEVINE. Yes. The legal doctrine that says we can be hired or fired for any reason or no reason.

Mr. SIKORSKI. But in the security area, we have heard testimony to this effect. Isn't that good, in terms of national security, protecting our secrets and the rest? Isn't it important that the Government be absolute, final, this is it?

Mr. DEVINE. But I think there is a distinction there between a definitive decision and an arbitrary decision. The decisions should be final, but they should not be based on whim.

Mr. SIKORSKI. I have a theory that this system being contemplated is more harmful to national security clearance decisions than the current system, or even a looser system, in the sense that when you eliminate the due process rights of notice and the defense against those accusations that are made, you build a record that is open to sabotage by envious, competitive colleagues, by neighbors that do not like you, by ex-spouses, by adversary nations.

Mr. DEVINE. I agree, Congressman.

Mr. SIKORSKI. You can fashion a hypothetical wherein this denial without a right to understand the reasons and to clarify the record means that you open yourself up to exploitation. We are willingly allowing, under this system, employees to be exploited. We are aiding those who would seek to exploit them, including our enemies.

Mr. DEVINE. I think that is very insightful. Overall, the area where this Executive order disintegrates, from a civil liberties threat to a national security threat, is its indirect effects. By expanding the domain of secrecy, we expand our vulnerability to it being exploited.

By imposing this type of basis for removing security clearances by exposing whistleblowers to total vulnerability to reprisal for their disclosures—although it could not be done under real law, it could be done under secret law here—we are going to be expanding Government secrecy generally and eliminating public policy debates about the most sensitive decisions that our Nation makes.

Mr. SIKORSKI. On that point, on the whistleblower, continuing on that same line, a whistleblower is a civil servant or an employee of the Government, directly or indirectly, who is required in a code of ethics, required under law, to raise concerns about waste, fraud, abuse, espionage, sabotage, whatever.

If we throw the system so much on the side of those who can punish whistleblowers, we may be buying into a system those people who would be afraid to speak up about supervisors or anyone else who can exercise the reins.

And if a civil servant sees security breaches, he or she might be hesitant to raise them knowing that the system could be used against him or her.

Is that a stretch of the imagination or just farfetched?

Mr. DEVINE. I do not think so at all, Congressman.

If whistleblowers contacted us after the hoped-for passage of the Whistleblower Protection Act, and after implementation of this draft Executive order, if that ever occurs, we would have to inform them, as a matter of professional legal responsibility, that they would not have the right to defend themself against this type of reprisal.

If this Executive order is implemented, Federal workers will pursue the code of ethics at their own risk.

Mr. SIKORSKI. And there have been security clearances played around with?

Mr. DEVINE. Oh, very much so.

Mr. SIKORSKI. Against whistleblowers, and you have a whole list of them in your testimony?

Mr. DEVINE. Yes, sir.

Mr. SIKORSKI. The third point you made is one that is difficult, it is the X, Y, Z and Nightline and press and congressional inquiries, and X, Y, Z civil servants.

Just briefly, as you put this together with the standard form 312, the oath of protecting classified material, together with this new proposed Executive order dealing with the questionable need-to-know inquiries by press or the Congress or the public generally, you have a system that you describe as a course of hoops through which employees will have to jump, and they jump at their own risk.

Mr. DEVINE. That is right. The two developments are very revealing. They are much like pieces in puzzle.

When we first were considering the Government's position, that a whistleblower who was not sure about an unmarked document's status should ask the boss, we assumed this was in good faith and thought, well, maybe there is some system to learn a document's status that would not require you to ask the boss. But you would be assured you had not breached any national security obligations.

After seeing this Executive order, we know that we were being very naive. What's the reason you have to ask the boss? The boss can make a record you were asking, so you will be identified as somebody who was asking the wrong questions. Under this Executive order, that in itself is enough to take away your clearance that your job depends on.

It is a nightmarish vision.

Mr. SIKORSKI. If your boss happens to be fudging the record or taking classified information out of the office and transporting it in a trunk, taking it home or copying things that should not be copied, your raising those issues would put you into a tougher situation to defend against any retaliation that that boss could be in a position to take under this proposal.

Mr. DEVINE. As I would interpret it, under this proposal, your boss would have a legal obligation to retaliate against you. It is a world turned topsy-turvy if this is implemented, Congressman.

Mr. SIKORSKI. The gentleman from Indiana.

Mr. MCCLOSKEY. Thank you, Mr. Chairman.

First, I want to thank both gentlemen for excellent, scholarly presentations. They are going to be very helpful to us.

I have nothing to ask about the material presented in your testimony. But for Mr. Adler, assuming a worst-case scenario, that the Bush administration approves these wonderful regulations, and the Congress either fails to approve corrective legislation, or if we did and it were to be vetoed, what would you say is the tone in the Supreme Court now for recognizing due process rights for Federal employees who are denied access or upgrading of security clearances?

Mr. ADLER. I think the issue would not be the Supreme Court's view of due process rights per se, but it would be the fact that in a long line of cases, stretching back over the past decade and a half, the Supreme Court has clearly now taken the position that in national security matters generally, the executive branch has such broad prerogatives that neither Congress nor the Constitution or the Bill of Rights can intrude upon those prerogatives.

For that reason, I would have little hope that the Supreme Court would find it necessary to curtail this Executive order in order to provide more substantial procedural due process rights.

Mr. MCCLOSKEY. Thank you very much, Mr. Adler. I appreciate that.

Mr. SIKORSKI. We have a whole host of questions. We will reserve those and thank you all for assisting us this morning.

Thank you.

We are going to do some cleanup work here.

Judge Bamford drove 3 hours to be with us. We have the representatives of three of the employee unions effected.

Why don't we all come up here?

We are going to try to get everyone accommodated. And I apologize. It seems these meetings always take longer than you would like.

I know everyone has things to do. I really express appreciation to the subcommittee to help us focus on this issue today. This panel consists of the presidents of three major Federal employee unions, whose members stand to be greatly affected by the proposed Executive order.

John Sturdivant is the president of the American Federation of Government Employees, the largest union representing Federal employees; James Peirce is the president of the National Federation of Federal Employees, which represents over 150,000 Federal employees; and Bob Tobias is the president of the National Treasury Employees Union, which represents over 140,000 workers.

We welcome all of you and thank you for coming.

Is Judge Bamford here?

[No response.]

Mr. SIKORSKI. Why don't we then continue?

John, do you want to begin?

STATEMENT OF JOHN N. STURDIVANT, PRESIDENT, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES

Mr. **Sturdivant**. Thank you, Mr. Chairman. I have submitted a lengthy statement that I would ask be included in the record.

Mr. **Sikorski**. It is not long as some of the others. [Laughter.]

Mr. **Sturdivant**. That is because I had to read it all before the staff did.

Mr. **Sikorski**. I do not think it was as long as my opening statement, in fact. [Laughter.]

Mr. **Sturdivant**. Well, I will attempt to summarize my remarks. I will try to be brief.

But I do want to maybe give the committee the benefit of some of my personal experiences, which you might find helpful.

Mr. Chairman and members of the committee, my name is John Sturdivant, president of the American Federation of Government Employees, AFL-CIO.

AFGE represents employees in 26 departments and agencies to whom the proposed Executive order on personnel security will apply.

The order governing access to classified information is of prime concern to them. The grant or denial of a security clearance to a particular employee is a sensitive and inherently discretionary judgment call. It is made by those persons in the executive branch supposedly having the necessary expertise in protecting classified information.

It is, by its very nature, primarily a subjective decisionmaking process. This fact, coupled with the undisputed need for a high degree of confidentiality with respect to national security information, makes a fair procedure for security clearance determination difficult to articulate.

Yet such a procedure is vitally important to insulate those who are affected by it from potential abuse and unfairness. Every effort must be made to insure that the procedure for security clearance determinations is as objective as possible, and affords all reasonable due process protections.

We concur with the stated purpose of the Executive order to establish a uniform personnel security program. This would be a decided benefit in that all employees would be subjected to the same grant or denial procedure and all would be able to fully understand and determine the process involved.

But equity among affected employees is not assured in this proposal. There are simply no meaningful provisions which would protect employees from an abuse of discretion exercised by those making security clearance determinations, nor are there any meaningful guarantees of due process rights.

Employees could easily be the victims of arbitrary and capricious decisions which could not be challenged.

The proposed order sets forth the premise that access to national security information should be restricted to only those who require it in order to perform official duties.

We concur with the premise, but the means of enforcing it is unrealistic. Supervisory personnel would be required to justify and certify the need for access. Then, the annual performance ratings of those employees would include an element concerning their performance of the certification function.

In reality, we must ask how can you effectively and objectively evaluate the performance of a purely subjective undertaking.

The entire order is subject to vastly different interpretations, sets forth a procedure which is totally, subjectively performed and which places employees at great risk.

The criteria for security determinations are that eligibility is to be restricted to United States citizens whose personal and professional history affirmatively indicate loyalty to the United States, strength of character, trustworthiness, reliability, discretion, and sound judgment.

These character traits are not defined and I suspect if each of us was asked to define them, no two definitions would be the same. The order though, does provide some guidance in assessing these character traits.

It provides that among the factors to be considered in determining whether access should be granted or whether the individual, one, has exploitable vulnerabilities, whatever that means, or has engaged in any exploitable conduct or indiscreet behavior.

Two, has demonstrated trustworthiness, reliability, excellent character and judgment.

Has engaged in criminal or dishonest activity, alcohol or substance abuse, or exploitable sexual conduct.

Four, has a history of mental, emotional, and financial stability.

Five, and is of unquestioned loyalty to the United States, however that is proven, and susceptible to undue influence, coercion or duress, however that is determined.

In analyzing the above factors, security officials are directed to consider "the activities of any person or groups with which the individual is bound by ties of affection, or with whom the individual is in close and continuing contact."

Standing alone, this direction certainly can move closely to the McCarthy era investigations.

Information obtained in connection with investigations for security clearances are to be analyzed by appropriately trained security personnel.

How are such personnel trained? What are the minimum requirements to perform such a job?

The order provides no clues.

Once an individual is granted a security clearance by an agency, it is to be recognized by all other agencies unless another agency has substantial information that the individual does not satisfy the basic eligibility criteria.

This provision points out just how subjective and arbitrary security clearance determinations can be. If the trained security personnel in one agency, utilizing the criteria set forth in the order, determine that an individual should be granted a clearance, how could the trained security personnel in another agency possibly make a contrary determination based on the same criteria?

The order permits this.

Pointing out the subjectiveness of the eligibility criteria and the vagueness of the evidence needed for a security clearance determination highlights how imperative it is that persons affected by such determinations have minimum due process.

There is no need to point out all the possible devastating ramifications of a refusal to grant or the revocation of a security clearance.

If a legitimate determination is made that an individual is a security risk, the ramifications might be deemed just consequences.

But, if because of a clerical error, a malicious accusation, an unsubstantiated allegation, an investigator's own moral or religious judgments, et cetera, an individual were to be denied or were to lose a security clearance, his career could be at an end.

How likely would it be for such an individual to obtain other employment?

Is it constitutional to deprive one of property, the ability to earn a livelihood, without any due process including just the right to know why it has happened?

This is precisely what the proposed Executive order could do. It revokes the longstanding rights now provided employees and provides only extremely limited rights to already on board employees who are being investigated.

The limited rights can be unilaterally waived by an agency which believes that they would not be consistent with national security interests.

Is such broad, discretionary and unilateral authority to deny employees due process rights necessary to protect a democratic country's national security information?

We believe the answer is "no." For over 30 years, certain due process rights have been afforded applicants and employees who have been denied a clearance, or employees whose clearances have been revoked.

We know of not a single instance where the United States was placed in jeopardy by informing the employee of the ground for denial.

Has this situation changed?

We respectfully submit that it has not.

These, Mr. Chairman, are what we believe to be the most glaring flaws of the proposed Executive order.

We urge the President not to sign it as it is. And if he does, we urge this committee to move forward to take whatever action is necessary to insure that employees have as a minimum a detailed, written explanation of the basis for the decision, a reasonable opportunity to reply, submit additional information, confront persons making statements adverse to the individual, be represented by counsel or other representative of their choosing.

We urge a written notice of the results of the review and the identity of the deciding official and an opportunity to appeal the final decision.

We thank you for this opportunity to present our views.

On a small personal note, I would just like to acquaint the committee with the fact that I do not come to this committee as a theorist or one who is operating strictly on theory.

As a Department of the Army employee, I worked for 15 years. I had a top secrecy clearance with a full crypto access. At the installation where I was a local union president, when I became president, they had people believing that you could not even file a grievance because it was a security matter.

We had instances during that time when, under what we call the rescope, or the recertification of a clearance, people did not pass that. Most of the time, those folks did not appeal the denial of their clearance. They simply were given the opportunity to resign, which they did.

Curiously enough, one individual who did appeal that process was able to prevail. And interestingly enough, not only did he get his clearance back, but he got a promotion.

That person, at the present time, continues to work for the Government in that installation and to make contributions to the system.

So I think what we have to understand, and certainly, part of this whole process, some of the discussion that goes around the FBI investigation and the method of gathering information, and the methods of dealing with hearsay, unsubstantiated allegations. Some of these investigations are very sloppy, and there needs to be a process whereby the employee can focus on those allegations, focus on whether we have fact or allegation and not pay the price of losing a security clearance.

Lucky enough, I was a very aggressive local union president. I was also a good employee. I was always able to get through my security clearances and I never had that problem. But there were certainly many people who were intimidated for one form or reason. We never knew the reasons because we did not talk about them then. And they were given the opportunity to resign.

So there are possibilities for abuse in this system, certainly for whistleblowers, people who might talk to the press. I do not see in this situation, or in this executive order, what will stop those folks, say, the Walkers, and people who are definitively involved in giving defense information to our enemies.

This proposed Executive order does nothing to deal with that problem.

Thank you.

[The prepared statement of Mr. Sturdivant follows:]

STATEMENT

BY

JOHN N. STURDIVANT
NATIONAL PRESIDENT

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, (AFL-CIO)

Mr. Chairman, members of the Committee, my name is John N. Sturdivant. I am President of the American Federation of Government Employees, AFL-CIO (AFGE), the largest union representing federal employees. AFGE represents many employees employed in the some 26 Departments and Agencies to whom the proposed Executive Order on Personnel Security will apply.

The purpose of this hearing, to examine the proposed Executive Order governing access to classified information, dated January 24, 1989, and more specifically, to examine the development, content, implementation, and purpose of the Order and its impact on civil servants, is of prime concern to many of AFGE's members. The grant or denial of a security clearance to a particular employee is a sensitive and inherently discretionary judgment call that is made by those persons in the Executive Branch supposedly having the necessary expertise in protecting classified information. It is, by its very nature, primarily a subjective decision making process. This fact coupled with the undisputed need for a high decree of confidentiality with respect to national security information, makes a fair procedure for security clearance determinations difficult to articulate. Yet such a procedure is vitally important to insulate those who are affected by it from potential abuse and unfairness. Every effort must be made to insure that the procedure for security clearance determinations is as objective as is possible and affords all reasonable due process protections.

The Preamble to and the stated purpose of the proposed Executive Order, set forth in Section 9.3, indicates that its purpose is to establish a uniform federal personnel security program concerning those individuals who will be considered for access to national security information. This would be a decided benefit in that all employees who must have a security clearance would be subjected to the same grant or denial procedure. Employees, therefore, would be able to fully understand and determine the process involved. But, as can be seen from an analysis of the proposed Order, equity amongst affected employees is not assured in this proposal. There are simply no meaningful provisions which would protect employees from an abuse of discretion exercised by those making security clearance determinations nor are there any meaningful guarantees of due process rights. Employees could easily be the victims of arbitrary and capricious decisions which could not be challenged. In fact, the proposed order specifically states that the limited and conditional due process rights that are provided are not intended to create any procedural or substantive rights. (Sections 7.3 and 9.3). This intention is affirmed by an earlier statement in the proposed order that a "determination of eligibility for access to such [national security] information is a wholly discretionary security determination.

The proposed Order provides that access to national security information should be restricted to only those persons "who require access to national security information in order to perform official duties". In order to insure that access is limited to those who must necessarily have access in order to perform their jobs, the Order requires every the supervisory personnel of the various organizations to justify and certify the need for access. There is, in all likelihood, few who would argue these points. The first problem arises though in how this limitation on access is to be enforced. Section 1.1(b)(2) provides that the "annual performance ratings of supervisory personnel who certify an individual's 'need for access' shall include an element concerning their performance of this function. In reality, we must ask how can you effectively and objectively evaluate the performance of a purely subjective undertaking? This provision in an of itself, is not a major concern for most employees but we mention it here because it sets the tone for the rest of the Order. The entire Order is subject to vastly different interpretations, sets forth a procedure which is totally, subjectively performed and which places employees at great risk.

The criteria for security clearance determinations are that eligibility is to be restricted to United States citizens whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, reliability, discretion, and sound judgement. These character traits are not defined and I suspect if each of us present today was asked to define them, no two definitions would be the same. The Order though, does provide some guidance in assessing these character traits. It provides that among the factors to be considered in determining whether access to national security information should be granted or continued are whether the individual, during the at least previous seven years, (1) has exploitable vulnerabilities -- whatever that means -- or has engaged in any exploitable conduct or indiscreet behavior; (2) has demonstrated trustworthiness, reliability, excellent character and judgment; (3) has engaged in criminal or dishonest activity, alcohol or substance abuse, or exploitable sexual conduct; (4) has a history of mental, emotional, and financial stability; (5) is of unquestioned loyalty to the United States -- however that is proven -- and not susceptible to undue influence, coercion, or duress -- however that is determined. In analyzing the above factors, security officials are directed to "consider the activities of any persons or groups with which the individual is bound by ties of affection, or with whom the individual is in close and continuing contact..." Standing alone, this direction certainly is akin to the McCarthy era investigations.

Information obtained in connection with background investigations for security clearances are to be analyzed by appropriately trained security personnel. The Order, however, does not address the training of such personnel. How are such personnel trained? What are the minimum requirements to perform such a job?

Once an individual is granted a security clearance by an Agency, it is to be recognized by all other agencies unless another agency has substantial information that the individual does not satisfy the basic eligibility criteria. First of all, I must raise the question of how much information is needed to satisfy the quantum measurement termed "substantial". But more importantly, this provision points out just how subjective and arbitrary security clearance determinations can be. If the trained security personnel in one agency, utilizing the criteria set forth in the Order, determined that an individual should be granted a clearance, how could the trained security personnel in another agency possibly make a contrary determination based on the same criteria? The Order, though, would permit this.

Pointing out the subjectiveness of the eligibility criteria and the vagueness of the evidence needed for a security clearance determination highlights how imperative it is that persons affected by such determinations have minimum due process rights. There is no need to point out all of the possible devastating ramifications of a refusal to grant or the revocation of a security clearance. If a legitimate determination is made that an individual is a security risk, the ramifications might be deemed just consequences. But, if because of a clerical error, a malicious accusation, an unsubstantiated allegation, an investigator's own moral or religious judgments etc., an individual were to be denied or were to lose a security clearance, his career could be at an end. How likely would it be for such an individual to obtain other employment particularly if his entire career had been spent in government service? Is it constitutional to deprive one of property, the ability to earn a livelihood, without any due process including just the right to know why it has happened?. This is precisely what the proposed Executive Order could do.

Employees have a property interest in their jobs which the Supreme Court has indicated is protected under the Fifth Amendment to the Constitution of the United States. (Perry v. Sindermann, 408 U.S. 593 (1972)). In Perry, the Court held that officials were obligated to grant an employee a hearing at his request, where he would be informed of the grounds for his non-retention and be provided an opportunity to challenge their sufficiency.

Admittedly, the precedent cases do not involve an issue of national security. While there have been several cases touching on this area, the issue has not been framed precisely. Essentially the Courts have held that, "with respect to employees in sensitive positions there is a reasonable basis for the view that an agency head who must bear the responsibility for the protection of classified information committed to his custody should have the final say in deciding whether to repose his trust in an employee who has access to such information." Department of the Navy v. Egan, _____ U.S. _____(1987). Stated very generally, the Court has determined that the rationale behind the grant or denial of a security clearance resides with the

Executive Branch but of prime importance is the fact that in so stating the Court has in no way denied the due process rights of employees. The Court has recognized that those rights may be somewhat limited but it has recognized those rights. The proposed Executive Order, on the other hand, attempts to revoke longstanding rights provided employees. It provides for a written explanation of the basis for a denial, a reasonable opportunity to reply and to submit further information under oath, written notice of the results of the review and an opportunity to appeal in writing to a higher authority appointed by the Agency Head. However, these limited rights are not made available to the thousands and thousands of persons who are seeking an initial clearance or access at a higher level. The only individuals who would be entitled to these limited due process rights would be those already onboard employees with security clearances who were being reinvestigated. However, even in those instances, the procedures set forth above for review can be unilaterally waived by an agency which believes that procedural due process "would not be consistent with the national security interests of the United States." Is such broad, discretionary, and unilateral authority to deny employees due process rights necessary to protect a democratic country's national security information. We believe the answer is obvious -- No!

For over thirty years, certain due process rights have been afforded applicants and employees who have been denied a clearance or employees whose clearances has been revoked. We know of not a single instance where the United States was placed in jeopardy by informing the employee of the ground for denial. Has this situation changed? We respectfully submit that it has not.

These, Mr. Chairman, are what we believe to be the inherent flaws of the proposed Executive Order with one exception. That is, a Fifth Amendment, denial of due process challenge raised by an employee challenging a security clearance determination would probably fail. The Court would simply state that since the Executive Branch is constitutionally cloaked with authority to act to protect national security it can take such actions as it deems appropriate notwithstanding the absence of procedural due process guarantees for affected employees. If on the other hand, the Congress took action to provide certain due process rights, such would probably pass constitutional muster. Matters of foreign relations and national security policy are not exclusively within the realm of the Executive Branch. Congress has considerable powers in the areas of foreign relations and national security policy. For example, the President is Commander in Chief, but if Congress does not appropriate the funds, the President will have no army to command. So, in conclusion, we urge this Committee to move forward to take whatever action is necessary to insure that employees who are denied a security clearance or whose security clearance is revoked have, at a minimum:

--a detailed written explanation of the basis for the decision

-- a reasonable opportunity to reply, submit additional information, confront persons making statements adverse to the individual, be represented by counsel or other representative or their choosing,

-- written notice of the results of the review and the identity of the deciding official, and

-- an opportunity to appeal the final decision.

We appreciate this opportunity to appear today to express our views on the potential dangers of the proposed Executive Order Governing Access to Classified Information. I will be happy to respond to any questions which you may have.

Mr. SIKORSKI. Mr. Peirce, your whole statement will be in the record as written, and you can use your time as you see fit.

STATEMENT OF JAMES PEIRCE, PRESIDENT, NATIONAL FEDERATION OF FEDERAL EMPLOYEES

Mr. PEIRCE. Thank you.

I appreciate the opportunity to present our views today before the committee on this draft executive order.

In the interest of time, I think almost anything that I would say would be redundant. I would just like to say that NFFE, too, shares the executive branch's concern with protecting the national security. But no basis has been established for suspending due process rights as a necessary component of that national security.

These two goals, maintenance of due process and upholding the national security, have been consistent for years. Since one of the very foundations of our democracy is the right to due process, we feel very, very strongly that any attempt to circumvent it is unwarranted.

We commend you, Mr. Chairman, for your interest and your diligence in pursuing these important matters for Federal employees.

We urge the committee to maintain pressure on the administration until it comes up with a security clearance procedure which protects the due process rights of those individuals protecting the national security.

I will not take up any more time of the committee, Mr. Chairman. I am very happy to answer any questions that you might have.

[The prepared statement of Mr. Peirce follows:]

STATEMENT BY

THE NATIONAL FEDERATION OF FEDERAL EMPLOYEES

Mr. Chairman and Subcommittee Members:

On behalf of the National Federation of Federal Employees, which represents over 150,000 Federal workers in 40 agencies across the nation, I appreciate the opportunity to present our views today on the draft Executive Order regarding security clearances for civilian employees.

NFFE's interest in the proposed Executive Order arises because for many Federal workers, holding a security clearance is tantamount to holding a job. Any changes in this area will have a tremendous impact on Federal careers.

Our understanding is that security clearance procedures have been established by the various agencies for many years. We do not understand the need for an Executive Order unifying and standardizing the individual agencies' procedures in the absence of any problems discovered by the agencies. Our more serious concern, however, is that the standardization will ultimately result in fewer rights for employees who hold positions requiring security clearances.

NFFE is concerned about three categories of employees:

a) employees needing initial access to a security clearance for purposes of obtaining a sensitive position,

b) employees who currently hold a security clearance but who need access to a higher level of security to take on different responsibilities, and

c) employees whose current clearances are revoked during their periodic reviews, or those whose clearances are revoked outside the normal review process because of other circumstances.

In light of the 1988 Supreme Court decision, *Navy v. Egan*, the substantive rights provided by the proposed Executive Order become even more critical. In that case, the Supreme Court held that the Merit Systems Protection Board does not have the authority to review the substance of an underlying security clearance determination in the course of reviewing an adverse action appeal. In addition, since current case law holds that arbitrators must use the same standards as the MSPB when deciding adverse action cases, neither would an arbitrator be permitted to review the substance of a security clearance removal when deciding an adverse action case.

So if an employee's security clearance is revoked for unjust reasons, and the employee loses his or her job because of it, the worker has no objective forum in which to argue against the agency's real reasons for dismissal.

Worst of all, the absence of a forum for appealing security clearance denials opens the door for McCarthyism. If supervisors need not disclose the basis for their denials or revocations of security clearances nor subject these decisions to review by an objective panel, they could discriminate against employees for reasons of sex, race, National Origin, sexual preference, union activity, or because the employee is a whistleblower. Assumptions about an individual's fitness for holding a security clearance will be made according to every individual supervisor's own prejudices and preferences, rather than on objective determinations about the employee's loyalty and trustworthiness.

Specifically, I'd like to draw the subcommittee's attention to Section 7.2 of the proposed Executive Order which outlines the due process rights certain employees could expect in a security clearance request. Employees who are determined not to meet the standards established in the Executive Order for access to a security clearance shall be provided

1) a detailed written explanation for the basis of that conclusion,

2) a reasonable opportunity to reply in writing,

3) written notice of the results of the review and the identity of the deciding official, and

4) an opportunity to appeal in writing to a higher official.

At first blush, Mr. Chairman, these seem like components of a reasonable appeal procedure. Yet there are so many exceptions to the category of individuals entitled to this appeal route, that the rule may as well not exist.

For example, the due process rights of Section 7.2 would not apply to individuals seeking initial security clearance access or to those seeking access at a higher level, two of the three categories mentioned above. In our estimation, Mr. Chairman, the protections outlined would apply only to those employees in category c whose clearances are being periodically reviewed or reviewed under special circumstances.

In addition, Section 7.2 contains the proviso that subjects its terms to Section 7.3, which allows an agency head to waive the meager protections of Section 7.2. Although Section 7.3 (a) also permits agencies to provide additional review proceedings, nothing in the spirit of the proposed Executive Order encourages us to think that they would do so. Even if agencies chose to provide additional protections as a general practice, Section 7.3 (b) would apparently allow them to waive these procedures on a case-by-case basis.

The proposed Executive Order effectively deprives employees who are initially applying for security clearances, or who are applying for upgrades in security clearances (categories a and b above) with any kind of due process and ability to refute charges that affect their security status. When you combine that with the *Egan* decision, (which covers employees in category c above) it means that workers will have no forum whatsoever for contesting agency decisions which have a profound impact on their careers and their lives.

This is a departure from at least one agency's current security clearance review procedures. For example, the current procedure used by the Department of Army provides due process for *every* individual whose security clearance is denied or revoked. The procedure is similar to that outlined in the proposed Executive Order with written responses and the opportunity for appeal to a higher authority, but it does not limit access to its use or allow discretion as to whether the procedure will be waived. Clearly, Mr. Chairman, if the proposed Executive Order is implemented, it would deprive Army civilian personnel of the limited rights they are now guaranteed.

Moreover, NFFE believes that the current Army procedure does not go far enough in protecting the due process rights of employees. Department of Defense Directive 5200.6, which governs the security clearance review program for Defense contractor personnel, provides employees with the right to a hearing and the opportunity to cross-examine persons providing adverse information. Since the government has heretofore considered a contractor employee's right to a hearing to be appropriate, we certainly believe that it should be continued for those workers and applied to civilian employees in the government as well.

Finally, Mr. Chairman, I would like to draw the Subcommittee's attention to the privacy right implications of Standard Form 86 which will become mandatory April 1, 1989. While not strictly a topic of this hearing, SF 86 is a portion of the security clearance process and presents its own problems.

SF 86 requires Federal employees undergoing updated security clearance reviews to supply extensive background information and to authorize the Government to obtain other information needed to conduct a thorough security review. Through use of SF 86, the Government is able to collect an extensive record on intimate personal details such as financial status, emotional problems, and brushes with the law.

These admissions are not the only requirement, however. The form also requires employees to sign a sweeping release that grants total immunity to "any individual ... from all liability for damages that may result to me on account of compliance or attempts to comply with this authorization." The release also directs the agency to give all the information to any authorized agency that requests it, despite any prior agreements to the contrary.

The principles of the Federal Privacy Act are in direct conflict with the Standard Form 86. Under the Act, agencies can use personal information internally and externally, but only for the purposes for which it was collected. Additionally, the Privacy Act holds agencies liable for damages resulting from violations of the Act's provisions, such as those protecting individuals from an agency's improper dissemination of personal information or the maintenance of inaccurate information. Neither of these protections exists for employees who must complete SF 86.

Under the release conditions of SF 86, an employee would have no remedy if an agency's disclosure of inaccurate information resulted in the employee's being fired. Certainly, individuals who are requested to provide intimate personal details in order to obtain a position with the Federal Government deserve to know that those details will be kept confidential and used only for legitimate puposes. Without such assurance, the very validity of the information reported on the form can be called into question.

An individual applying for a job requiring SF 86 faces a dismal choice indeed, for failure to complete the form, it is noted "may affect your employment or clearance prospects," yet the release portion indicates that once personal information is collected, its distribution may not be kept confidential.

The Office of Personnel Management should remove the release language from SF 86. It speaks poorly of the Government's respect for the Privacy Act and is likely to be imitated by other agencies. If OPM will not take this step on its own, Congress should compel the agency to stop seeking releases.

In conclusion, Mr. Chairman, NFFE shares the Executive Branch's concern with protecting the National Security, but no basis has been established for suspending due process rights as a necessary component of that National Security. These two goals - maintenance of due process and upholding the National Security - have been consistent for years. Since one of the very foundations of our democracy is the right to due process, we feel strongly that any attempt to circumvent it is unwarranted.

That concludes my statement. I will be happy to answer any questions.

Mr. SIKORSKI. Thank you. We appreciate it.
Mr. Tobias.

STATEMENT OF ROBERT TOBIAS, PRESIDENT, THE NATIONAL TREASURY EMPLOYEES UNION

Mr. TOBIAS. Mr. Chairman, I very much appreciate your interest in this matter.

Mr. SIKORSKI. Again, your statement will be in the record also.

Mr. TOBIAS. Thank you.

As I say, I very much appreciate your interest in this matter. You were appointed to chair this committee and immediately jumped into this issue. It is very clear from your examination of these prior witnesses that you have mastered a very difficult subject. And we appreciate it very much.

Thank you.

I think when we are talking about this Executive order, we start with the idea that we already only have minimal due process. And that is the right to information and the right to respond.

I certainly agree with Mr. Adler, that what we ought to be talking about is not taking away the minimalist approach, but expanding the rights that already exist.

But even if we accept the fact that the existing system has some sort of reason to exist, what we see is the administration who is attempting to change the system without one scintilla of rationale.

Nothing has been offered in the record today, nothing has been offered by anyone to explain why this change needs to be made.

There is no evidence in support of a need for change. It seems to me that when you are taking away such minimal rights, there ought to be some overriding concern that has been introduced in the record by someone to support that removal.

We have seen nothing. It is a frightening prospect that the Federal Government, operating as an employer, may take an action which denies an employee access to secret information, or denies a security clearance without informing that employee.

I thought it was absolutely absurd that we heard that the Privacy Act is a remedy for this problem. Anybody who has tried to correct a record or file a lawsuit to correct a record knows that by the time—even if the lawsuit is successful, so much time has elapsed that any success goes to the heirs and asides, certainly not to the existing employee.

The impact, of course, of a denial of a security clearance is very simply, and the Supreme Court has made it clear, no job and no right to collaterally attack the denial of the security clearance. And that is the real issue. The Government maintains the unilateral right, and an appeal to the MSPB is certainly no remedy for the removal of that right.

So this is a kind of system, which I think you correctly pointed out, allows for retaliatory action, which allows for a few, a small group of people who could go out of control, to deny security clearances only to friends who are also out of control.

We think that this Executive order is a bad idea. And we hope that it dies a very nice death.

Thank you.

[The prepared statement of Mr. Tobias follows:]

STATEMENT OF

ROBERT M. TOBIAS
NATIONAL PRESIDENT
NATIONAL TREASURY EMPLOYEES UNION

I am Robert M. Tobias, National President of the National Treasury Employees Union. NTEU is the exclusive representative of over 140,000 Federal Workers, including workers at the Department of Energy and the Nuclear Regulatory Commission, whose jobs depend upon security clearances. I am pleased to have the opportunity to testify today on the proposed Executive Order governing security clearances. I commend you, Mr. Chairman, for acting so quickly to review this important matter.

Currently, individual departments and agencies have their own policies for granting security clearances. The purpose of the proposed Executive Order is to establish a uniform federal personnel security program for all agencies. NTEU can understand the reasons for establishing uniform standards throughout the government and we have little comment about much of the proposed Executive Order.

There is, however, a very major and significant problem with the Executive Order as currently drafted. The proposed order would allow the government to deny security clearances to federal workers and employees of government contractors without giving them the reason for the denial or a chance to respond. Under current regulations, most federal employees are entitled to a written explanation, to the fullest extent consistent with national security interests, of why they have been denied a clearance. They also have an opportunity to rebut the accusations and appeal the decision. Employees have been entitled to these rights since the Eisenhower administration -- We see no reason to take them away now.

The draft order is inconsistent in its denial of notification and appeal rights. It entitles employees who currently hold security clearances to such rights if their clearance is taken away. It takes away these same fundamental rights of due process from those who are denied their initial security clearances, or those who are refused clearance of a higher level. If an agency head wishes to institute additional appeal rights, Section 7.3 (a) of the draft order allows it to be done. The draft order clearly states, however, that "these additional procedures are not required, and this section is intended to create no procedural or substantive rights".

Sections 6.1 (B.and C) of the draft order include some of the factors that should be taken into consideration when deciding whether to grant an individual a security clearance. For example, whether the individual "has exploitable conduct or has exploitable vulnerabilities or has engaged in any exploitable conduct or indiscreet behavior; . . . has engaged in criminal or dishonest activity, alcohol or substance abuse, or exploitable sexual behavior, and has a history of mental, emotional, and financial stability..." may be considered. The draft order also states that Executive Branch security officials should consider "the activities of any persons or groups with which the individual is bound by ties of affection or with whom the individual is in close and continuing contact, and the activities of any persons in the individual's immediate family..."

NTEU recognizes the need for intense scrutiny of those individuals who are to be entrusted with our national security. However, many of these items are subjective, and people can hold varying views on what constitutes indiscretion, alcohol abuse, exploitable sexual conduct, and the like. Under the draft order, a person could be denied a security clearance because of rumor, innuendo, unsubstantiated testimony, or personal prejudice. The applicant would never know why their clearance was denied, and would never have the opportunity to prove that the allegations against them were false.

The draft order is inconsistent with recent court rulings on the subject. In Webster v Doe, 108 S.Ct 2047 (US Sup Ct, 1988), the Supreme Court held that the removal of a CIA employee is reviewable under the Constitution, although not under the arbitrary-and-capricious standard in the Administrative Procedure Act, when the CIA attempted to revoke a clearance an employee had had for years and then remove him.

As recently as January, 1989, the U.S. Court of Appeals for the Ninth Circuit ruled that the denial of a security clearance based on homosexual conduct may be reviewed in court. Dubbs v.Central Intelligence Agency, No.86-2826, 9th Cir 1/25/89. In this case the court followed Webster to allow review of an agency decision to deny the first-time application of a new employee of a contractor.

The draft order itself is also inconsistent, and discriminatory. It allows notification and appeal for those currently holding clearances but not for first time applicants or those applying for a higher level clearance. If it does not present a security problem to allow this process for those with current clearances that are revoked, we do not see how it is a problem to continue to extend those due process rights to others being denied clearances.

In many cases, denial of a security clearance is tantamount to denial of employment. Without a security clearance, the Supreme Court has held an employee may be discharged and the employee may not collaterally attack the clearance denial. Before a person is fired or denied a job, they should be entitled to know why, and to correct any misinformation that may have been a factor. NTEU does not understand why this unfair denial of rights was included in the draft order, and the order offers no explanation. The language dealing with this consists of a few words. This order, if implemented, would do away with the rights of thousands of current and potential federal employees and employees of federal contractors. We do not see any logical reason for denying these people the right to know why they did not receive a clearance, and to appeal that decision. It is impossible to see any risk to national security inherent in providing someone with this information.

NTEU sincerely hopes that the President will refuse to sign the Executive Order in its current form, and will have it rewritten to protect the rights of all workers and applicants. If he does sign it, we will be asking for your help to see that it is never implemented. This unfair and unreasonable proposal should never be implemented.

Mr. **Sikorski**. Thank you.

Judge Bamford was to begin today, and instead, we saved him to bat clean up here. He retired from full-time Government service in 1978. He then served as chief Administrative Law Judge at the Interstate Commerce Commission for 8 years. He was appointed to the Industrial Security Appeal Board at the Department of Defense in 1983, and resigned, as we will hear, and the reasons for it, in 1985.

Judge, the subcommittee thanks you for the inconvenience to you and your great effort and use of your resources to get here to assist us in developing a record on this proposed Executive order.

Your statement, as submitted, will be inserted in the record at this point, without objection. And you can use your time to highlight it or to do as you like.

STATEMENT OF JUDGE ROBERT C. BAMFORD

Judge **Bamford**. Thank you, Mr. Chairman.

First, I want to express my appreciation for having the opportunity to appear here today.

I do want to apologize for being tardy. I thought 2½ hours would get me up here, but the Wilson Bridge thought otherwise.

During the 2 years that I served on the Appeals Board, I cannot at this time tell you how many cases we handled, but I would say between 50 and 100 as a wild guess.

We operated under procedures under the regulations, DOD 5220, which required the agency to give each applicant a hearing if he was denied.

He is first given a so-called SOR, statement of reasons, which I call an indictment, because it says you are not going to get clearance because you did this or you did not do that.

Now he may answer that, he could have a hearing before a hearing examiner, he could have aid of counsel, he could bring in his own witnesses, and he had a right to confront most witnesses unless they happen to be particularly secret.

He had a right to appeal the decision of the hearing examiner to the Appeals Board. And if he did not like that, he had a right to go to the Federal courts.

And the Federal decisions, appellate court, and district court decisions in this jurisdiction are full of those cases.

In September 1985, the powers that be in the Pentagon revised this directive and specifically removed the paragraph that required the Assistant Secretary of Defense to assure the independence of the hearing examiners and the Appeals Board, and severely restricted the authority of the Appeal Board.

At that point I left. Because, frankly, I felt that they could buy a rubber stamp for a lot less money than they were paying me.

Now, at that time, and today, we are operating under an Executive order issued by President Eisenhower in 1960, which clearly confirms these rights and the present regulations implement those.

During the two years that I was on the Board, I never saw a classified document, I never saw or heard a national secret, I never saw or heard a need for that. What we are involved with here is determining the character of the applicant and trying to make a crystal ball estimation as to what he will be like in the future.

We look at this past and his past record and history and then we can find out, not for the purpose of condemning what he has done in the past, but for the determination, if we can, of what he may do in the future.

It is crystal ball; it is subjective in some ways. The people doing it have got to work very hard to put to one side their own subjective reaction.

Some of these people you would not invite home for dinner, but they can still be good security risks.

Now the process, the U.S. Court of Appeals has clearly said that what you are coming in here for, no matter what you call it, is a government license to take a private job.

Most of the cases that I dealt with, involved employees of private contractors. And that is all the way from heads of relatively small corporations, to firemen in defense plants, and people like that who might possibly, in the case of fire, have to go into a secured area. They had to have clearances. That was pretty hard for some of those fellows.

Now if you turn down that license, of course, I do not need to elaborate on the impact on the individual. It is quite obvious. There are times, I think I heard mentioned here a minute ago, there are times when one really suspects, as you look at the record, that the process is being abused.

You cannot prove it. There is nothing in the record to prove it, but after you have done this for awhile, you have a sixth sense that something is going on back here. And that is the kind of stuff we want to protect people from.

I see no basis whatsoever for finding that national security is going to be improved by eliminating some due process for citizens of the United States; they are entitled to fair treatment by their own Government. That is all they are asking for.

Let us give them a fair deal. Let them have an opportunity to find out what the charges are against them, what the evidence is. And, if possible, establish that it is incorrect.

Now, if they lose, that is too bad. But why take away from them the opportunity to do that. This is recognized for 200 years of constitutional government as being the least you could do for your citizens.

I sincerely hope this Executive order does not go out in this form.

Thank you.

[The prepared statement of Judge Bamford follows:]

Robert C. Bamford

I am Robert C. Bamford. I retired from fulltime Government service in 1978. During the last 8 years, I served as Chief Administrative Law Judge at the Interstate Commerce Commission.

Subsequently, in September, 1983, I was appointed as a member of the Industrial Security Appeal Board at the Department of Defense. I served on this Board until I resigned in September, 1985. During those two years, I drafted the Board Decision in every case, but one, which came before us.

During my two years with the Appeal Board, we operated under regulations which provided an applicant for security clearance with a right to hearing before a Hearing Examiner, aid of counsel, a right to confront witnesses, and right to review by the Appeal Board and the Federal Courts. The applicant was entitled to a written decision by the Examiner and the Board. This regulation, issued 1976, included a provision which specifically required the Assistant Secretary of Defense to assure that Examiners and Board Members rendered impartial and independent findings and decisions in Security Clearance cases. DOD #5220.6 (12-20-76).

On August 12, 1985, a revised edition of this Directive was issued which restricted the power of the Board and omitted the provision guaranteeing the independence of the Examiner and Board Members. At that point, I resigned. The proposal before you today, however, clearly completes the process begun at that time of eliminating any semblance of due process in these cases. If we had any doubt, we need only to look at the last paragraph of the proposed order, which revokes Executive Order No. 10865, issued by President Eisenhower in 1960. That order specifically confirms the right to a due process hearing. The proposed order makes the administrative denial final and rests only in the "wholly discretionary" decision of some unseen official. No recourse is left to the citizen to protect himself from arbitrary action.

During the two years that I served on the Appeal Board, I never saw a classified document, or heard a national secret. I point this out to illustrate that there is no national security risk in giving citizens of this country an opportunity, in open court, under constitutionally-established legal procedures, to show that they are, in fact, trustworthy persons. I agree that national security is the paramount factor in the final decision. But it plays no part in assessing the character of an applicant. And it provides no justification for depriving a citizen of his right to fair treatment by his government.

Putting aside the national security mystique, we should recognize that the process in issue, as described by the U. S. Court of Appeals, is simply the issuance of a government license for private employment. Smith v. Schlesinger, 513 F. 2d 462, 478 (App. D. C. 1975).

Most requests for security clearance are initiated by employers who wish to employ a person in an activity which requires security clearance. That person then comes to the government seeking a license to take the job. The denial of this license can mean a personal disaster, because, in many cases, these people have specific qualifications of primary use in security-related work. At the least, the denial is a brand on their reputation and self-respect which can never be eradicated.

During my service, the Appeal Board reversed a number of denials of clearance because the evidence simply did not support the decision. There are times when one suspects that the process is being used to get rid of an employee for causes unrelated to security. Where the decision is made in the unreviewable discretion of a single official, on a paper record, with no chance to contest the evidence, unfair and unfounded decisions are even more probable. Even the most conscientious and dedicated official can make mistakes. The proposed system makes those mistakes final.

Finally, there is no basis for a finding that national security is improved by depriving the citizen of a fair hearing. Surely, a judgment made on a full record, with participation by the applicant and aid of counsel, will result in a firmer basis for the decision. Appellate review will provide a safety net that is common, and demonstrably necessary, in all our judicial procedures. Government officials are not infallible, and this is not a place for battlefield command decisions.

Mr. **Sikorski**. Thank you.

The gentleman from Indiana.

Mr. **McCloskey**. I do not have many questions. I want to thank everyone on the panel for excellent statements.

It has been mentioned, that there is the possibility of ideological, philosophical or personal idiosyncratic-type judgments of an individual being cause for denial of a clearance.

Can anyone comment on that?

I guess one thing I could just do is give you a wild hypothetical. Depending upon the religious or personal proclivities of a person doing the clearing, you could see someone losing a clearance opportunity because he or someone in his family, at some point had been involved in a legal abortion. Whereas maybe another clearing authority could deny someone with a very strong right-to-life background clearance on the basis of zealotry or instability, or some subjective statement like that.

Can you give any examples of extreme philosophical or ideological, arbitrary decisions?

Judge **Bamford**. May I respond to that?

Mr. **McCloskey**. Yes.

Judge **Bamford**. One SOR that I saw had as one of the allegations upon which the denial was based the statement, you frequently consume alcoholic beverages at lunch. Counsel for the Government, for the hearing examiner, said he did not know what that meant.

Obviously, if that is a basis for denial of security clearance, you are going to have to empty the Pentagon overnight: [Laughter.]

Mr. **McCloskey**. From top to bottom, right? [Laughter.]

Judge **Bamford**. That was seriously in the SOR.

Mr. **Sturdivant**. Of course, if you look at some of the——

Mr. **McCloskey**. I am looking at the problems with defining these character vulnerabilities.

Mr. **Sturdivant**. If you look at some of the character traits, trustworthiness, as exploitable vulnerabilities, you know, it is just so broad and subjective that, you remember that certainly on an investigation for security clearance or on what we used to call a rescope, I do not know what they are calling it now because it has been a while, you basically go back to see what type of life the person leads, who they spend their time with, where they frequent.

So you are really looking at lifestyle a lot and certainly if the person who is reviewing a security clearance kind of has an aversion to one particular lifestyle and is extreme at one end and the person who is being investigated, you know, in the 1960s, the 1980s or whatever, what you have done is at the other end in a particular lifestyle then there is the potential for abuse and potential for a clash.

One of the interesting situations is a guy, when I worked for the Department of the Army, a guy that I used to work side by side with lost his clearance, and at the time. I am just trying to remember whether or not he was even advised that he had any rights.

It was kind of a situation of, you do not have clearance, it did not get cleared, we will give you an opportunity to resign. But as we talked about it—and of course everyone had to have a top secret clearance to work at that installation so it was kind of like, you know, you are kind of an outcast and I did not really see a lot of difference from his lifestyle and mine. Obviously there was.

But he resigned and he went away. He went to work for the Government, but he went to work for the Government at another installation. So I have always felt that some of those folks, the intervention of our union at that level, that there was just not a lot that you could do, or not a lot that we took on at that level.

But as I said the person who did appeal that eventually when they got into the allegations and so forth, it turned out that the person who appealed it, he had been in a bar and he had been approached by some Russian diplomats and I do not know whether they were drinking in the bar, or whatever, but he reported the contact. He followed the procedures. He reported the contact and as a result of him reporting the contact——

Mr. SIKORSKI. He has to report the contact.

Mr. STURDIVANT. Right, and as a result of him reporting the contact then there was some question about his clearance.

Mr. McCLOSKEY. Does anyone have any feeling—I think I have asked the question about five times but I do not think it was ever answered by the panel connected with the administration—of who or what is really driving this? Who is the point person, or really, why did the administration feel this was necessary?

[Everybody present nods negatively with the exception of Mr. Sturdivant.]

Mr. SIKORSKI. President Reagan was up to his keester in 1983——

[Laughter.]

Mr. McCLOSKEY. I have no more questions.

Mr. SIKORSKI. Thank you. I just have some quick questions. Judge Bamford, you described your action, your resignation in response to a system that you thought was too rubber stampy.

How would you describe this proposal in relationship to a system that you did not think was responsive enough to due process rights in the first place?

Judge BAMFORD. Without meaning to be flippant, Mr. Sikorski, there is a tremendous difference between pruning a bush to make it grow better and cutting it off at ground level. I think the proposal that you have before you now cuts it off at ground level.

Mr. SIKORSKI. Thank you. Mr. Tobias, you represent in your union a lot of people at the Department of Energy. I think most Americans do not realize that the Department of Energy produces the nuclear weapons, the warheads that we use in our nuclear arsenal. The need for security there is as important as any place in our governmental structure.

Whistleblowers have been there. I serve on the oversight investigations Subcommittee of Energy and Commerce and I have sat in meetings after meetings after meetings, hearings behind closed doors, where someone is there measuring to make sure they are not being penetrated by eavesdropping devices on these issues.

It has been the whistleblowers at these facilities that have brought some of the problems to light before our people, more people have been killed and the public is endangered and our stockpile is placed at risk. My question is, how would this draft order affect these people that have risked and lost, in some cases, their jobs and livelihood? Are they better off or worse off?

Mr. TOBIAS. They are clearly worse off, because now there is absolutely no way they can tell what is happening to them, or what will happen to them. I think that this would seriously emasculate the whistleblower protection, but I think that there is another aspect as well, Mr. Chairman.

I receive calls from people who work at the Nuclear Regulatory Commission at the Department of Energy. People who participate off the job in activities which would be described as antinuclear activities and they are tremendously fearful that if this executive order were to be enacted, someone could drop something in their file which says they are subversive because they may be picketing, or submitting a letter to the editor, or whatever, and lose their security clearance and lose their job.

Mr. SIKORSKI. If you had watched Day One the other night we probably would not have had the bombing in the first place if we had eliminated the people who had some reservations.

Mr. TOBIAS. That is right. It is not only the whistleblowers, but the people who would fear losing their security clearances for whatever reason.

Mr. SIKORSKI. Mr. Peirce, you have received complaints from employees who have felt that their security clearances had been played with, had been denied, revoked or threatened because of—unjustifiably?

Mr. PEIRCE. Absolutely. This has been an on-going thing. That is the way the system has been. Now we are just literally opening the door to more abuse without any justification.

Mr. SIKORSKI. My concern is, if you are going to give someone a clearance or not, you should have the best data investigation and fact record possible. I do not know how you get that by just hearing one side, especially the negative side, of the story.

Mr. PEIRCE. I would agree. Any time anyone's career is at stake, every side has to be heard and by the same token, if an investigation is involved that is going to make or break a person's career, it should be a very thorough investigation. Any decision should be based on fact and not somebody's whim or their attitude toward somebody.

Mr. SIKORSKI. I sense that there is a lot of agreement in the area of reducing the amount of classification needs, reducing the amount of clearances and making the investigations meaningful, thorough, factual and fair. Because of that and the objectives, people do not have concerns with the goals that are being used to drive this order. It is what you do with the due process rights later on. Is that a pretty fair assessment?

Mr. PEIRCE. Well, I think that is clear. For 26½ years I worked for the Air Force and I held a security clearance. Most of the material that I saw, probably 80 percent of it, should not have had any classification on it to begin with.

It is those things that I think sometimes, that we are looking at now, which is why have so many people with security clearances when it is not necessary? Anything that comes off the desk, too often, was classified when it should not have been.

Mr. SIKORSKI. Well, Ms. Lawson was right. I do not know if you heard her testimony about the need to reduce the number of people that are seeing these things, but she is right there. Mr. Sturdivant, you, I think in your testimony said that there is not a case—and I have said it, in terms of the rationale—this is my last question; no one I know of that is in this process that now will be affected, at least potentially, by this Executive order, is responsible for spying or being turned, or disclosing state secrets.

Mr. STURDIVANT. Right, and I think the other thing—I think part of this whole focus, that everybody understands the need to safeguard defense information. Certainly this seems to be off the mark if you take a look at the espionage that has occurred in this country, some of the more celebrated cases, this order would not have done anything to prevent that.

I think another area that needs to have a serious and close look at is the standards, the training and the nature of the investigators and how these investigations are carried out, and how they arrived at factual information about people's behavior and conduct.

Mr. SIKORSKI. I think the Executive order does, if my memory is correct, put emphasis on the education, training and repeat training on that.

Well, I want to thank all of you, Judge Bamford and the three presidents, for your assistance.

I think we have accomplished a thorough analysis of some of the ramifications, especially the more troubling ramifications, for civil servants and again, this controversy does not surround or involve protecting national security or state secrets or catching spies. It does involve fairness, fair play, due process, uniformity and an information base that is accurate and can lead to good national security clearance decisions.

The subcommittee does not understand how the denial of individual due process is linked to improving our national security access system. It does know that fairness is sometimes more important than drawing bright lines in a memo. Minimal fairness results in a better, more productive work force and ultimately a better personnel security system.

We have heard from Mr. Devine and Mr. Adler about the effects the proposal could have on 3 million Americans. We have heard from the presidents of the three largest unions representing Federal employees. We have heard from a judge who has been in the trenches listening to controversies with these clearance procedures.

We have heard from the very talented woman in charge who was tasked with coming up with the Executive order some 5 years ago. Her concerns about due process that she wrote in a memo to Mr. McFarlane some time ago, I believe still stand.

We have heard from the gentleman who is in charge of the agency that is expected to do incredible gymnastic work on this if it is signed, and I think it is fair to say that the subcommittee in a strong bipartisan fashion raised legitimate due process issues and hope that we can resolve these before we have to go to some legislative response and in the process get a better classification system that serves our national security interests without affronting due process.

Thank you.

[Whereupon the subcommittee adjourned at 12:44 p.m.]

[Subsequent to the hearing, the following statements and letters were received for the record:]

ONE HUNDRED FIRST CONGRESS

GERRY SIKORSKI, MINNESOTA, CHAIRMAN
PATRICIA SCHROEDER, COLORADO
FRANK McCLOSKEY, INDIANA
CONSTANCE A. MORELLA, MARYLAND
THOMAS J. RIDGE, PENNSYLVANIA

U.S. House of Representatives
COMMITTEE ON POST OFFICE AND CIVIL SERVICE
SUBCOMMITTEE ON CIVIL SERVICE
406 CANNON HOUSE OFFICE BUILDING
Washington, DC 20515-6244

TELEPHONE (202) 225-2821

April 24, 1989

Mr. Richard C. Darman
Director
Office of Management and Budget
Washington, D.C. 20503

Dear Mr. Darman:

We are writing to express our concern regarding the attached letter of March 24, 1989, from your office to the Subcommittee on Civil Service challenging the propriety of the Subcommittee's March 9, 1989, hearings on the Administration's "Proposed Executive Order Governing Access to Sensitive Information."

The letter evidences a fundamental lack of understanding of the long history of shared power between the Congress and the Executive Branch in establishing policy in the area of security access. Attached, for your review, is a memorandum from the Office of the Clerk, U.S. House of Representatives which the Subcommittee requested upon receipt of OMB's letter.

As the House Counsel's memorandum explains, Congress' oversight authority is unquestionable. It stems from the constitution and has been interpreted by the Supreme Court to be "...as penetrating and far-reaching as the potential power to enact and appropriate under the constitution." Barenblatt v. United States, 360 U.S. 109, 111 (1959). Specifically, Congress has a long history of intensive oversight and legislative activity in the security access area. (See House Counsel's Memorandum, pages 2-5)

Furthermore, the Office of Management and Budget's claim that Congress has no place in the Executive Branch's deliberative process regarding proposed Executive Orders is simply not grounded in fact. To the contrary, examples of Congressional review of Executive proposals in this area are well documented. (See House Counsel's Memorandum, pages 7-9)

The House Counsel's memorandum as well as OMB's letter of March 24, 1989, will be placed into the record of the Subcommittee's March 9, 1989, hearings.

Sincerely,

WILLIAM D. FORD Chairman House Committee on Post Office and Civil Service	GERRY SIKORSKI Chairman Subcommittee on Civil Service, House Committee on Post Office and Civil Service

GES/cd

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

March 24, 1989

Cheryl DeSienna, Esq.
Chief Counsel
House Committee on Post Office and Civil Service,
Subcommittee on Civil Service
406 Cannon House Office Building
Washington, D.C. 20515

Dear Ms. DeSienna:

This letter concerns the hearing held on March 9th by the Civil Service Subcommittee on the topic of proposed changes to personnel security programs. The Subcommittee requested two Executive Branch officials to testify at the hearing. As you and I explicitly agreed, these officials were to appear only to testify on general issues and topics concerning personnel security; they were not expected to respond to questions addressing the specific provisions of a draft executive order governing access to classified information, which currently is under review within the Executive Branch.

Unfortunately, the hearing was not conducted in accordance with our agreement. An Administration witness was asked repeatedly to comment on specific draft order provisions, about which no established Administration position yet exists.

Congress traditionally has respected the confidentiality of the Executive Branch's deliberative process regarding nascent executive orders. Congress and the Executive heretofore have debated the issues surrounding such orders in a candid and informal manner, thereby pursuing a constructive dialogue while protecting the confidentiality of the process. Those not privy to the terms under which we agreed to let our witnesses testify, might interpret the March 9th hearing as breaking new ground in this regard. Hence, I feel compelled to restate that we reserve the right in future cases to assert the confidentiality of the deliberative process. We expect, in keeping with longstanding executive order practice and principles of comity, that Executive Branch officials will not be called to testify publicly with respect to ongoing deliberations on proposed executive orders. The purpose of this letter is to make clear that we do not consider the March 9th hearing to be a precedent to the contrary.

Very truly yours,

Terry V. Thiele
Terry V. Thiele
Assistant General Counsel

Donald K. Anderson
Clerk

Steven R. Ross
General Counsel

Office of the Clerk
U.S. House of Representatives
Washington, DC 20515-6601

April 10, 1989

MEMORANDUM

TO: The Honorable Gerry Sikorski
Chairman
Subcommittee on Civil Service
Committee on Post Office and Civil Service

FROM: Steven R. Ross SRR
General Counsel to the Clerk

R. Michael Long
Assistant Counsel to the Clerk RML

SUBJECT: Subcommittee Hearings on Executive Order Proposals

You have requested an opinion on the propriety of conducting Subcommittee hearings on a proposed Executive Order. Specifically, the Subcommittee held hearings on March 9 of this year that focused on a draft Executive Order (entitled "Proposed Executive Order Governing Access to Sensitive Information") currently being circulated to the agencies and departments for comment. Those hearings appear to have served an important function: after the subcommittee heard testimony which indicated serious concerns regarding questions of authority and due process, the Executive Branch has withdrawn the draft order. However, the Office of Management and Budget has protested to you the propriety of the conduct of those hearings. For the reasons set forth below, the Subcommittee's review of this proposed Executive Order was entirely appropriate and supported by the past practices of the Congress and the Executive Branch in formulating information and personnel security policies.

The subcommittee's hearings were firmly grounded in Congress' constitutional power of oversight. That power is vast. The Supreme Court has stated that "[t]he scope of the power of inquiry . . . is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution." Barenblatt v. United States, 360 U.S. 109, 111 (1959). See also Eastland v. United States Servicemen's Fund, 421 U.S. 491, 504 (1974) ("power to investigate is inherent in the power to make laws") (citing McGrain v. Daugherty, 273 U.S. 135, 173 (1927)); Anderson v. Dunn, 6 Wheat 204 (1821); United States v. Rummely, 345 U.S. 41, 46 (1953)).

With regard to the modern security classification program for protecting national security, which has both information and personnel components, Congress has intensively exercised its oversight and legislative powers. In fact, Congress initially prodded the development of the Executive Branch's loyalty-security program for federal employees, Executive Order 10450 (1959) and its predecessors,[1] to which the new Executive Order relates. (The draft order provides for the summary denial or revocation of an employee's security clearance based upon, inter alia, "loyalty to the United States"). As a result of Congressional investigations and hearings just prior to World War II focusing on security risks in the federal workforce, Congress enacted a series of laws to protect the national security from employee security risks. Initially, Congress worked to prevent the employment by the government of those who belong to Nazi and Communist organizations.[2] With the beginning of the War, statutes were then enacted allowing for the dismissals, apart from the normal civil service procedures, of federal employees on national security grounds. Of particular importance,[3] was the

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[1] See, e.g., Executive Order 9806, Nov. 25, 1946 (establishing the President's Temporary Commission on Employee Loyalty); Executive Order 9835, March 2, 1947 (entitled "Prescribing Procedures for the Administration of An Employee Loyalty Program in the Executive Branch of the Government").

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[2] See, e.g., Emergency Relief Act of 1939, 53 Stat. 935 (no funds appropriated by the Act may be used to compensate anyone who advocates "or who is member of an organization that advocates the overthrow of the government of the United States through force or violence"); Justice Department Appropriations Act of June 29, 1941, 55 Stat. 292 ($100,000.00 to the FBI for the sole purpose of investigating all federal employees who were "members of subversive organizations"); Amendment to the Hatch Act, § 9-A, 53 Stat. 1148 (1939), 5 U.S.C. § 7311 (illegal for federal employee to "have membership in any political party or organization which advocates the overthrow of our constitutional form of government"); Emergency Cargo Ship Construct Act of 1941, 55 Stat. 5, 6 (1940) (appropriations rider prohibiting funds to pay employee who "advocates or is a member of an organization that advocates the overthrow of the government by force or violence").

[3] Others include many temporary appropriations provisions. See, e.g., the Department of State Appropriations Acts of 1947 and 1949, 60 Stat. 458, 63 Stat. 456 (temporary summary dismissal authority granted to Secretary of State); the National Military Establishment Appropriations Act of 1950, 63 Stat. 1023; the General Appropriations Act of 1951, 64 Stat. 768; the Departments of State, Justice, Commerce, and the Judiciary Appropriations Act of 1952, 65 Stat. 581.

Act of Dec. 17, 1942, 56 Stat. 1053, which waived the regular civil service dismissal rules under the Lloyd-LaFollette Act, 5 U.S.C. § 7513, and allowed for the dismissal of employees of the War and Navy Departments and the Coast Guard if "warranted by the demands of national security." This authority granted at the height of World War was, nevertheless, limited by procedural protections afforded the employee including the right to be "informed of the reasons for such removal." *Id.* Eventually, Congress extended summary dismissal authority -- for reasons of national security -- to other agencies of the government, the Act of August 26, 1950, 64 Stat. 476, codified at 5 U.S.C. § 7532. The important employee protections that had been recognized even in the midst of War were retained. Today, the law stands as the government's primary protection from internal security risks.[4] Congress's concerns in the 1940's expressed in these legislative enactments spurred the development of the Executive Branch's subsequent loyalty-security program contained in Executive Orders promulgated during the 1950's. *See supra* note 1 and accompanying text.[5] Indeed, today the Executive Branch's classification system is supported by a network of legislative enactments.6/ Further, Congress has routinely conducted oversight of that system.7/

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[4] *See also*, the National Security Act of 1947, 50 U.S.C. § 403(c) (summary dismissal authority for the Director of the CIA); 50 U.S.C. § 833 (Secretary of Defense given summary dismissal authority for employees of the National Security Agency).

[5] Similarly, the Executive's program for classifying information was kicked off during this period by Congressional activities. The first Executive Order (Executive Order 8381, March 26, 1940) setting forth security classification policy was premised upon a Congressional statute which provided for the security of armed forces installations and equipment and "information relative thereto." 52 Stat. 3 (1938). *See generally*, *House Comm. on*

Government Operations: Security Classification Policy and Executive Order 12356, H.R. Rep. 731, 97th Cong., 2d Sess. (1982).

Several Congressional enactments during the 1940's then set the stage for the subsequent Executive Order ("Definitions of Vital Military and Naval Installations and Equipment") Executive Order 10104, February 1950) issued by President Truman. *See, e.g.*, the Atomic Energy Act of 1946, 60 Stat. 755, 42 U.S.C. §§ 2014(y), 2161-2166 (creation of "restricted data" and requirement of FBI investigation on character, associations, and loyalty for employee access); the Act to Provide for Assistance to Greece and Turkey, 61 Stat. 103 (1947) (FBI clearance necessary to work on programs and projects provided under the Act); Mutual Security Act of 1951, 65 Stat. 373 (FBI clearance for certain employees required).

6/ The classification system is impotent without a network of legislation, for Congressional statutes -- not an administrative system -- establish the criminal offenses for security violations, their conduct and intent standards, the judicial procedures, the weight to be given to the fact of classification and the punishment of such offenses. *See, e.g.*, the Freedom of Information Act, 5 U.S.C. § 552(b)(1) (fixes test for withholding documents -- "in fact properly classified" -- with *de novo* judicial review); the Privacy Act, 5 U.S.C. § 552(a); the Central Intelligence Agency Information Act, Pub. L. No. 98-447, 98 Stat. 2209; Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1801-1811; the Classified Information Procedures Act, 18 U.S.C. §§ 1-16, and above all the espionage laws, 18 U.S.C. § 771, *et seq.*.

7/ For a few examples, *see, e.g.*, *Hearings Before the House Comm. on Post Office and Civil Service: To Protect the National Security of the United States*, 81st Cong., 2d Sess. (1950); *Hearings Before the Senate Comm. on Post Office and Civil Service: Administration of the Federal Employee's Security Program*, 84th Cong., 1st and 2d Sess. (1956); *Hearings Before the House Comm. on Government Operations: Availability of Information From Federal Departments and Agencies*, 84th and 85th Cong. (1957); *Hearings Before the House Comm. on Armed Services: Proper Classification and Handling of Government Information Involving National Security*, 92d Cong., 2d Sess. (1974); *Hearings Before the House Comm. on Post Office and Civil Service: Federal Personnel Security Background Investigations*, 96th Cong., 2d Sess. (1980); *Hearings Before the Senate Comm. on Governmental Affairs: Federal*

The importance of Congress' legislative and oversight activities in this area has been recognized by the Executive Branch and confirmed by the Supreme Court. Just two years ago, the Solicitor General for the United States in argument before the Supreme Court stressed Congress' grant of statutory authority through the National Security Act that provides for summary dismissals by the CIA director for national security purposes. 50 U.S.C. § 403 (c). Brief for the Petitioner, Webster v. Doe, No. 86-1294 (U.S. Supreme Court, Oct. Term. 1987). The Solicitor General noted that "congressional inquiry and oversight" is an important limitation on such discretion and provides a potential remedy for any abuses that may occur, therefore justifying Congress' intent to prohibit judicial review of the CIA director's dismissal decisions. Id. at 44. The Supreme Court agreed with the Solicitor General that the statute governs the Director's decisions, but held that Congress had not intended in the Act to preclude judicial review of constitutional issues. Webster v. Doe, 108 S. Ct. 2047 (1988). See also Cole v. Young, 351 U.S. 537 (1955) (5 U.S.C. § 7532 governs dismissals for national security reasons in other agencies). That same year, the Supreme Court again noted the role that Congress plays in the security classification field. Department of Navy v. Egan, 108 S. Ct. 818, 825 (1988) (judicial deference to executive security

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Government Security Clearance Programs, 99th Cong., 1st Sess. (1985); Hearings Before the House Comm. on Armed Services: Security Administration and Management of Special Access Programs, 100th Cong., 2d Sess. (1988).

classifications decisions "unless Congress specifically has provided otherwise").[8]

In its letter of March 24, 1989 to the subcommittee, the Office of Management and Budget has challenged the propriety of the hearings on the new Executive Order stating "Congress traditionally has respected the confidentiality of the Executive Branch's deliberative process regarding nascent executive orders." Congressional review of administration proposals (as opposed to final decisions) is, however, a traditional and preferred method of developing policy in this area. In 1977, House hearings were held on a proposed Executive Order on classification in which Justice Department representatives testified and Congressional input was solicited. Hearings Before the House Comm. on Government Operations: Security Classification Exemption to the Freedom of Information Act, 95th Cong., 1st Sess. (Sept. 20, 1977). As with the Civil Service subcommittee hearings on March 9th of this year, administration witnesses indicated that the proposed Executive Order was not the administration's final position and that there was room for improvement in the draft.

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[8] The Court has also acknowledged the importance of Congressional oversight in the national security field, Laird v. Tatum, 408 U.S. 1, 15 (1972) ("continuing monitoring of the wisdom and soundness of Executive action" in the intelligence context is "appropriate for Congress acting through its committees and the 'power of the purse'"). Moreover, in upholding the Independent Counsel statute, the Court noted last year that "oversight" was one of the "functions that we have recognized generally to be incidental to the legislative function of Congress." Morrison v. Olson, No. 87-1279 (June 29, 1988) slip op. at 36.

Id. at 13. It was not until nine months after the House hearings, and substantial revision, that the new classification Executive Order was signed by the President.

Similarly in 1982, House hearings were held on President Reagan's proposed new Executive Order on security classification after administration officials provided several Congressional Committees with a draft of the proposed order being circulated to the agencies and requested Congressional comment. Hearings Before the House Comm. on Government Operations: Executive Order on Security Classification, 97th Cong., 2d Sess. (1982). In issuing its report on Reagan's Executive Order, that Committee noted "that consultation by the executive branch with the Congress and the public during the decisionmaking process for security classification rules [] help[s] to define and clarify secrecy issues, identify problems with the operations of the classification system, and improves the quality of the final product." House Comm. on Government Operations: Security Classification Policy and Executive Order 12356, H.R. Rep. 731, 97th Cong., 1st Sess. 35 (1982).

The Congressional airing of proposals for such Executive Orders is an important and traditional step in the formulation of security classification policy. Congressional comment is most critical prior to the issuance of such orders while the policy is being formulated. The greatest issue -- should the policy be made by Executive directive or statutory enactment -- can best be examined at that time. Further, policy errors can be fully ironed out before the policy is formally adopted. A record is created as to whether the order would be consistent with statutory authority and intent, in time to take proper steps to remain in accordance with such intent.[9] For Congress to await the issuance of the order before it comments would often create an empty exercise. The subcommittee's hearings on March 9 were entirely proper.

SRR:kjb

9/ For the importance of that record, see, e.g., Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto Ins. Co., 103 S. Ct. 2856 (1983); Dames & Moore v. Regan, 453 U.S. 654 (1981) ("validity of the President's action. . . hinges on a consideration of all the circumstances which might shed light on the views of the Legislative Branch toward such action. . ."); Kent v. Dulles, 357 U.S. 116 (1958) (passports and national security).

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No Recourse

Just suppose you're a computer scientist working for the government and feel you're ready for more challenging work. Say a job description is published that represents a step up with better pay, more responsibility, etc. So you apply. Oh, and by the way -- an upgrade in your security clearance is required -- from Secret, lets say, to Top Secret.

In your interview with the security officer, because you are honest and dutiful to a fault, you admit to a couple of somewhat embarrassing life experiences. Your marriage has had its problems over the years and on a couple of occasions while traveling on business you have visited an adult bookstore in another city. Also, a neighbor's wife, having keyed in on your domestic situation, makes a pass at you for which you fall -- once -- but then break it off out of guilt and shame.

Subsequently, you tell your wife as part of a general reconciliation, she deals with the news, and your life goes on. So--you tell this painful story in order to be absolutely honest with Big Brother, your employer, and there it ends, right?

Wrong. In fact, guess what? Your security clearance is denied on this basis. Feeling this is unfair, you hire a lawyer. The lawyer retains a psychiatrist to examine you in order to determine whether there is a serious flaw in your character making you vulnerable to sexual excess and blackmail, or whether you are a fairly normal Joe who has acted out of character under a particular stress. The psychiatrist finds you to be pretty much an ordinary Joe and testifies to that effect. In front of friends and associates who are there as character witnesses, each of these peccadillos is dissected and discussed in detail for the administrative law judge, who ultimately rules against you anyway because your psychiatrist is not an expert in "espionage".

So you spend more money for your lawyer to appeal. When the case is finally heard by the administrative appeals court, a thunderous reversal of the lower court's verdict comes down, affirming your suitability for a clearance and ordering it to be granted.

This is a true story, one of several cases involving security clearances that I have been personally involved with as a forensic psychiatrist. In this case as well as at least two others that readily come to mind, a person's clearance has either not been granted or suddenly yanked for reasons that at best are irrelevant to one's reliability and loyalty and at worst are based on rumor, inaccurate reports, or possibly personal vendetta.

All of my three cases ended happily in that each person was able to acquire or regain his clearance. On the other hand, they were able to do so only at considerable expense. For one thing, the money spent on a competent, tenacious lawyer and a capable forensic psychiatrist was substantial. And in each case, success came at the cost of exposing the most embarrassing aspects of one's private life to family, friends, and coworkers.

Many of us will be critical of this system, not only because of its "guilty until proven innocent" quality, but also because of how much one must sacrifice in order to prevail against an unjust decision. Yet how much worse would it be if noone had the opportunity even to challenge such decisions?

An article some weeks ago in the *Post* indicates that the Bush administration is planning to remove this very opportunity. Ruth Marcus wrote that "The Bush administration is circulating a draft executive order on classified information that would allow the government to deny security clearances to federal workers and employees of government contractors without giving them reason for the denial or the chance to respond....The draft order would grant no rights of due process to those denied their initial security clearances or those refused a higher clearance."

A legal friend tells me that one could try to justify such an executive order on national security grounds (that it overshadows invididual prerogatives) along with the notion that being denied a particular job happens to people all the time and is not the same as being denied a basic right like the right to vote. But experience indicates--mine, at least--that the security clearance bureaucracy is no less fallible than most other ones we know of, and without the presence of an error-correcting apparatus, its blunders will continue to lead to the loss or denial of clearances to loyal and trustworthy people. In my book that's a miscarriage of justice no matter what legal arguments could be made in its favor.

People's jobs often depend upon such clearances. One man, though he worked for a civilian personnel recruitment agency, would have lost his job altogether if he had not been able to gain a clearance, because the agency's main contract was with a University Physics lab to recruit scientists for secret projects. In his case, a brief and frankly shoddy psychiatric screening by someone retained by the government resulted in his being labeled an alcoholic and an antisocial personality. Neither diagnosis could stand up to the scrutiny of cross examination and in light of the results of another, fuller examination.

Not long ago I had to apply for a Secret clearance myself so that I could perform an evaluation on a criminal defendant whose work and alleged crimes involved national security. It took forever after my application was filed for an FBI agent to call and schedule an appointment with me. He never showed up at the appointed time, nor did he call to apologize or reschedule for over a week. When we reappointed, he did not show up again or call. In the meantime someone from the Justice Department did let me know that the clearance had been granted. Weeks later, a second FBI agent, a woman, called to say my case had been reassigned to her. Once again an appointment was made followed by a failure to appear on her part and no call. When I described this to a friend who is a senior FBI agent, he rolled his eyes and said I "wouldn't believe" the fall-off in quality or recent FBI hirees. And isn't it inevitable that the dimmer of the bulbs would be shunted off to such things as security clearances rather than the exciting and more challenging work of catching criminals?

Here at the medical society we may mumble into our beards whenever the subject of lawyers comes up. But thank God for them when you legitimately need one, especially when it comes to defending you against the weight and power of the government.

But if the proposed executive order goes into effect, noone will be able to review or protest the government's handling of his application for a clearance if it were denied. A Kafkaesque veil will be drawn over the processes by which these decisions are made. In my sample, three out of three cases were reversed when they were challenged. If this, not to mention my own personal experience, reflects on the competence of the original investigation, and it does, imagine how much worse things will get when investigators know they are insulated from review by a higher authority.

The loss will in some of these cases be serious for the individuals, but it will also be a loss for the government. In at least the two cases described above and the one other that comes to mind, the end result without intervention would have been the loss of three valuable employees to government service, an institution that can ill-afford to lose qualified and competent persons. If this is an example of a kinder, gentler America, we might just as well go back to Nixon.

STATEMENT OF PERRY SHANKLE
PRESIDENT
AMERICAN FOREIGN SERVICE ASSOCIATION

BEFORE THE
SUBCOMMITTEE ON CIVIL SERVICE
COMMITTEE ON POST OFFICE AND CIVIL SERVICE

REGARDING THE PROPOSED EXECUTIVE ORDER
GOVERNING ACCESS TO CLASSIFIED INFORMATION

As the professional and labor organization representing the members of the United States Foreign Service, the American Foreign Service Association is alarmed by certain critical aspects of the proposed Executive Order on personnel security. Nearly all of our members must qualify for a top secret clearance as a condition of their employment.

The American Foreign Service Association is second to none in our concern for preserving our national security and the imposition of all reasonable measures aimed at safeguarding classified information. Many of the provisions of the proposed Executive Order are not reasonable, however, and we urge this Committee to take whatever action is necessary to see that it is not implemented.

Employees of the Department of State are currently subject to Executive Order 10450. Although that Order was drafted during the height of the McCarthy era, it nonetheless sought to abide by the American tradition that all persons should receive fair, impartial, and equitable treatment at the hands of the government. The proposed Order would deny American citizens many of the rights accorded them under the Order which has been in place since 1953.

While we would never advocate the granting of a clearance to an individual as to whom there is a question of disloyalty to our government, the criteria outlined by the Executive Order are so vague and subjective as to invite capricious implementation. The factors to be considered in determining whether a clearance should be granted or continued include whether the individual "has exploitable vulnerabilities or has engaged in any exploitable conduct or indiscreet bahavior". By the terms of the proposed Order, in initial investigations where sufficient information cannot be developed to evaluate an individual under the standards set forth in the Order, a clearance must be denied.

The agency is not required to provide any explanation for denying an employee a higher level clearance when the employee is determined not to meet the Order's standards. Nor is the agency required to grant these employees any opportunity to reply to or appeal the denial. Even as to those employees whose clearance level remains the same, rights of review need not be granted in revoking their clearances, where the agency determines that appeals procedures would not be consistent with the national security interests.

If there were some conceivable benefit to be gained by denying employees their rights to notice and review procedures in refusing them higher level clearances, it might offset the deprivation of due process rights of State Department employees. But no such benefit has been or can be articulated.

This is not merely a matter of a paper process. A determination that a Foreign Service employee does not qualify for a security clearance will destroy the employee's career. Foreign Service employees require access to national security information in order to do their jobs. Even if the agency does not move immediately to terminate his employment, the employee will be placed in a dead end position from which he will never rise. It is unamerican to deny employees as to whom personnel security concerns are raised the opportunity to clear their names and their reputations as well as to safeguard their livelihood.

The administration cannot argue that the current procedures are unduly cumbersome or have resulted in the granting or continuation of security clearances to individuals who do not merit this public trust. Rather, the proposed Order is cloaked in the rhetoric of concern for our national security. We are confident that this Committee will look beyond the rhetoric and recognize the devastating effects on loyal and capable human beings deprived arbitrarily of the means to pursue their craft.

Statement of Adam Yarmolinsky, Provost, University of Maryland Baltimore County

In the proposed new Executive Order scrapping the appeals process for the Personnel Security Program, the Bush Administration threatens a return to the excesses of the McCarthy era - a black period when security clearances were too often arbitrarily denied or revoked on flimsy or inappropriate grounds.

As a young lawyer in the early 1950's, assigned by my law firm to represent individual and corporate clients whose security clearances were challenged, I learned the importance of minimum standards of fairness in an area where judgments are necessarily subjective. And I saw what happened before there was any machinery to review decisions by timid or narrow minded or bigoted administrators.

We've forgotten about cases like that of the young man who responded to his landlady's question about how she could sell her large rooming house, with the suggestion that she look for a buyer like the Community Chest. "Community Chest" sounded like "communism" to the landlady, and the lodger might have ended his career in public service if there had been no avenue of appeal.

Or there was the case, documented in the collection of case studies I put together in 1955, of the hourly worker in the

Government Printing Office who needed a security clearance because he had access to classified materials, and who was charged by his security officer with "left-wing talk" because he had been heard to describe himself (a black) "as a second class citizen." At the board hearing his lawyer arranged, it turned out that he had said he would, "rather be a second class citizen in Mississippi than a first class citizen in Russia."

Then there was the case, documented in the same collection, of the man who was charged with having read "literature of a subversive nature," which apparently covered Das Kapital, Veblen's Theory of the Leisure Class, and Spengler's Decline of the West, and having "belittled" the capitalistic system. The man was later cleared, but it is still worth remembering that the system generated charges of this kind, and they reverberated through the ranks of the civil service and of defense industry.

Of course no one has a right to a security clearance. That's not the issue. But literally millions of people need security clearances in government and the defense industry in order to do their jobs. Unless there is some entity that can stand back and look at executive decisions, and compare the result in one case with another, groundless suspicion will tend to replace reasonable judgment, and independent thought and expression may be curbed by fear of retaliation.

Appeals boards are no guarantee of fairness. Some of the more outrageous cases in our collection were decided by appeals boards. But at least they offer a chance for review by a group of people who are outside the line of authority in the organization.

Appeals boards are important also because they serve to remind the system that it is dealing with a specific set of problems. Perhaps paradoxically, the existence of appeals boards makes it more likely that the system will go after genuine security risks, rather than pursuing dissenters, non conformists and odd balls, or just trying to find another way around cumbersome civil service dismissal procedures. As McGeorge Bundy observed in testifying before a congressional committee on security problems: "If we guard our toothbrushes and diamonds with equal zeal, we will lose fewer toothbrushes and more diamonds."

It is ironic that in a time when the Russians seem to be reining in their run-away security apparatus, the United States is proposing to remove one of the basic controls over our security system. I hope the Administration will take a second look.

Courier-Post
Opinion

WEDNESDAY, MARCH 8, 1989

As I see it

U.S. should not deny clearances without explanation

By VICTOR KAMBER

While the Soviet Union is opening up its society and copying some of the best aspects of American democracy, our government is secretly considering measures that would make any Politburo member feel right at home.

A little-known executive order prepared in the waning days of the Reagan administration is now on George Bush's desk awaiting his signature. It allows the government to deny security clearances to federal workers or employees of government contractors without explanation. The person involved would have no right to appeal the ruling and could not refute any of the charges brought against him or her since they would never be revealed.

This places in the hands of the bureaucracy the power to deny employment to anyone, destroy careers, and hold up contract awards without stating why. If you're refused a security clearance, tough luck, too bad, don't ask why, go find another job. and forget about ever working in a "sensitive" area again. Don't worry, be happy.

THE ORDER doesn't go as far as Joseph Stalin would, but you can bet he's probably laughing in his grave at it.

Certainly, the potential for abuse is incalculable. If someone in the bureaucracy, for whatever reason, decides he doesn't like an applicant for a sensitive position — maybe the applicant's personality rubs him the wrong way or maybe he disagrees with the person's political views — he could make up a reason why the applicant was a security threat, and that person would be out of luck.

John Tower has faced an exceedingly difficult time winning Senate confirmation as Secretary of Defense due to allegations of excessive drinking, womanizing and conflict of interest. But he has been informed of the charges against him and been given the opportunity to respond.

Under this proposed executive order, if Tower or someone with a similar "checkered" history were appointed to a Defense Department position not requiring Senate confirmation, it would be a very different story. In all likelihood, he'd be refused a security clearance and with it the job, since the order states that "indiscreet behavior, including (substance) abuse or sexual misconduct" are factors to be considered in granting security clearances.

BUT THE PROPOSED executive order goes even further. It requires individuals with security clearances to report all contacts with those who appear interested in obtaining classified information. Thus, reporters who use their First Amendment rights or concerned citizens wanting to know more about their government stand the risk of being labeled a security threat simply for asking questions.

Nor does this proposed executive order stand alone. It's part of an alarming pattern of disregard for due process, civil liberties and our fundamental constitutional principles initiated by the Reagan administration.

The Iran-Contra affair was part of this pattern. In fact, buried in the investigations of the scandal was an apparent plan, developed by Oliver North, to suspend the Constitution and impose martial law in the event of a "national crisis." What constituted a "national crisis" wasn't specified. It could be nuclear war (in which case none of this would matter anyway), but it could also be a natural disaster or even "civil unrest." While this plan was ostensibly shot down along with North, its presence anywhere in the highest levels of our government is unsettling.

In a more recent example of this government-by-fiat mentality, an executive order was signed authorizing the federal government to approve local nuclear power plant evacuation plans without the cooperation or consent of state and local governments. This occurred after repeated attempts to develop such plans were blocked by states and localities concerned about the plants' safety.

IF GEORGE BUSH is sincere about his "kinder, gentler America," he has no better way to prove it than by killing the proposed executive order on his desk.

As a former CIA director and someone with a known penchant for secrecy, Bush may be predisposed to do the opposite, with frightening consequences for our democratic process. But as president, he is sworn to uphold the Constitution that these proposals so severely undermine. Bush has so far shown an encouraging propensity to reverse the excesses of his boss for the past eight years. His decision on this proposed executive order will be the best and most telling test yet of his seriousness in undoing the damage of the Reagan years and running a government worthy of the highest principles of this nation.

The writer is president of the Kamber Group, a Washington communications firm.

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